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Wanted: a Federal Standard for Evaluating the Adequate State Forum

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WANTED: A FEDERAL STANDARD FOR EVALUATING THE ADEQUATE STATE FORUM

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INTRODUCTION

It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter . . . cease to provoke further analysis.[1]

The term "adequate state remedy," which often represents the critical factor in determining where federal claims will be heard, has become a buzzword. Although 42 U.S.C. section 1983 gives plaintiffs invoking federally based rights a choice of forum,[2] judicial doctrines[3] may nevertheless reroute such plaintiffs to state tribunals on the assumption that their claims will be determined on the merits. There has been little focus on the casual manner in which the Supreme Court arrived at and justified this assumption, despite the body of literature on abstention-related jurisprudence.[4]

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1. Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).
2. *See infra* notes 162-64 and accompanying text.
3. *See infra* Parts II and III.
4. Scholars have questioned the authority of the federal judiciary to decline jurisdiction accorded by statute, see Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); have criticized the policies underlying abstention, see, *e.g.*, Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 875 (1974); Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1125-27 (1977); Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977); have defended these policies, see, *e.g.*, Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 626-27 (1981); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 580-85 (1985); and have discussed the appropriateness of extending restrictions on federal court discretion to grant equitable relief against pending state prosecutions to instances where the state proceeding is civil, see, *e.g.*, Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Aldisert, *On Being Civil to*

Defective standards for evaluating state forum adequacy have appeared in two principal areas. The first, epitomized by cases such as *Pennzoil Co. v. Texaco, Inc.*,[5] involves suits seeking injunctions or declaratory judgments against pending state proceedings.[6] *Pennzoil* affirmed that the federal judiciary should not intervene in such cases unless state procedures "plainly bar" consideration of the federal issues.[7]

The problem with this test is its failure to address the jurisdictional consequences of ambiguous state law. Suppose, for example, that Blue is a defendant in a state tort suit, and that his real estate business has been seized in a prejudgment attachment. Realizing that his livelihood will be lost before trial on the underlying tort, he commences a section 1983 suit in federal court challenging the attachment on fourteenth amendment grounds. He alleges that the state trial judge has refused to permit an interlocutory appeal of the attachment, and that discretionary appellate review of his claims is an uncertain and speculative remedy. Even if Blue's constitutional claims would probably not be heard in the state courts, *Pennzoil* appears to require dismissal of the section 1983 suit[8] because relief is not "plainly barred" in state tribunals.

The standards for evaluating a state forum have also been problematic in the area of constitutional torts. In a series of cases commencing with *Parratt v. Taylor*,[9] the Supreme Court has held that plaintiffs alleging procedural due process violations flowing from the random and unauthorized acts of state officials may not maintain section 1983 suits for damages in federal court if state remedies for the violations are adequate.[10] The failure to provide standards for determining adequacy, however, has caused confusion and conflict

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Younger, 11 CONN. L. REV. 181 (1979); Stravitz, Younger *Abstention Reaches a Civil Maturity*: Pennzoil Co. v. Texaco, Inc., 57 FORDHAM L. REV. 997 (1989); Vairo, *Making* Younger *Civil: The Consequences of Federal Court Deference to State Court Proceedings: A Response to Professor Stravitz*, 58 FORDHAM L. REV. 173 (1989).

5. 481 U.S. 1 (1987). *See infra* Part II.

6. Obstacles to obtaining a merits determination of federal claims in a state court are generally greater where the pending action is civil rather than criminal. *See infra* section II(B)(2); Vairo, *supra* note 4, at 194-97. However, criminal courts cannot provide class or prospective relief. *See, e.g.*, Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 194 (1978).

7. *See infra* notes 78-109 and accompanying text analyzing *Pennzoil* and its predecessors.

8. *See infra* section II(B)(1). *But see also infra* note 129 discussing a pre-*Pennzoil* circuit court response to such a suit.

9. 451 U.S. 527 (1981).

10. The § 1983 plaintiff would then have received all the process that is due. *See infra* subpart III(A).

in the lower courts.[11]

Presume that Gray has been involuntarily committed to a state mental hospital. He has assembled affidavits as a basis for challenging this commitment, but a hospital employee intentionally burns these materials. Gray files a section 1983 suit in the federal district court, requesting damages for the deprivation of his property and alleging that the nominal compensation available in the state forum would not enable him to reconstruct ruined affidavits from persons now residing overseas. The district judge dismisses the case, noting that under applicable Supreme Court rulings, state common-law remedies are adequate even when they do not accord the "full" amount that would be available under section 1983.[12]

The *Parratt* standard presents two difficulties. Failure to define adequacy has resulted, as in the *Pennzoil* area, in dismissal of cases which would probably not be heard on the merits by state tribunals.[13] Furthermore, plaintiffs like Gray may be accorded a state hearing but are not granted adequate recompense for intentional deprivations caused by state employees.

In developing its preference for state adjudication of federal issues under *Pennzoil* and *Parratt*, the Supreme Court articulated its policy justifications at some length. Federalism, which encompasses state autonomy and the harmonious coexistence of dual judicial systems, counsels against disruption or denigration of state processes. District judges would be engaging in unpalatable as well as inefficient expenditures of federal energy if they were to replicate state functions.[14] Yet these explanations of power allocation have neglected justifying the high Court's adequacy tests in situations where state courts do not fill the vacuum.

This Article argues that the federal judiciary should upgrade its present scrutiny of state forum adequacy in conformity with constitutional and congressional directives. Fortunately, a standard for such heightened scrutiny already exists in the Supreme Court's own jurisprudence.

This standard has been used in the adequate-state-grounds context when the Supreme Court must decide whether to grant cer-

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11. *See infra* subpart III(C).

12. *See infra* note 208 and accompanying text, discussing conflicting judicial rulings in cases involving intentional destruction of legal papers.

13. *See infra* notes 254-66 and accompanying text. The federal interest in redressing such deprivations is discussed *infra* subpart III(B).

14. These rationales and related policy justifications are discussed in full *infra* Part IV.

tiorari review of a state court decision that petitioner alleges has unfairly submerged federal claims.[15] The state's position is that it did not consider these claims on the merits because petitioner had violated a valid procedural rule that was a prerequisite to such consideration. Petitioner argues that this rule has not been consistently applied to other similarly situated state litigants and may therefore be discounted. The state responds that there has been no inconsistency, and that its decision must be upheld because it is based on adequate state grounds.

Resolution of such adequate-state-grounds cases turns on examination of ambiguous state law. In this context, the Supreme Court has conscientiously dissected the pattern and meaning of prior state precedent to make an adequacy determination. This methodology is far more appropriate for evaluating state forum adequacy than use of the *Pennzoil* and *Parratt* approaches.

Further analysis of the heightened scrutiny model is presented in Part I of this Article. Parts II and III discuss the *Pennzoil* and *Parratt* areas, respectively, and identify issues that the Supreme Court has failed to treat. Part IV compares the rationales proffered in the major cases previously discussed, and concludes that the present inconsistency in adequacy tests is unwarranted. In Part V, judicial and legislative solutions are proposed, accompanied by detailed examples.

I. THE HEIGHTENED SCRUTINY MODEL: ADEQUATE STATE GROUNDS

The paradigm of an inadequate forum is presented by a state's unwarranted refusal to hear a party's federal claims. Such a case might never be identified if the Supreme Court's methodology were simply to accept the state's own characterization of its processes. Posit a situation in which a state litigant who violated a procedural rule is thereafter barred from presenting federal issues to the state judiciary. The claimant seeks Supreme Court review, arguing that the procedural barrier invoked in the decision below has not been consistently applied in comparable litigation.

The state responds that its tribunals have expertly and fairly interpreted their own precedents and, therefore, the adequate-state-grounds doctrine precludes reversal. This doctrine applies when a decision of a state court rests on a nonfederal basis that supports the

15. *See infra* Part I.

judgment.[16] Where appropriate support exists, the Supreme Court follows a policy of restraining itself from reviewing the state determination even if federal issues have been raised.[17]

The critical question is whether the state grounds are reasonable and in accord with previous state authority.[18] If this test is not

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16. Initially, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), held that the mere presence of a federal issue in a case would not justify federal review of a state court decision that was appropriately supported by adequate and independent nonfederal grounds. *Id.* at 632-33. Ninety years later, the Court distinguished state substantive grounds, such as those in *Murdock*, from state procedural grounds. *See* Henry v. Mississippi, 379 U.S. 443, 446-49 (1965). While review of the federal question in *Murdock* would have no effect on the outcome, as the decision was independently supported by state law, a state procedural rule could conceivably be invoked to bar consideration of the federal issue. Thus, the validity of such a rule is in and of itself a federal question. The procedure must serve "a legitimate state interest." *Id.* at 447.

The independence of the state ground is also examined. *See* Delaware v. Prouse, 440 U.S. 648, 652-53 (1979) (Supreme Court has jurisdiction to review a federal issue where the state court did not declare that its decision rested on an independent state ground). The state ground must be broad enough to maintain the judgment. *See* Eustis v. Bolles, 150 U.S. 361, 369-70 (1893) (state ground that is sufficiently broad to support a judgment without reference to the federal question precludes Supreme Court review).

17. This policy of abstention is less a product of explicit congressional or constitutional restriction than a practice evolving out of the Supreme Court's interpretation of its own jurisdiction. *See* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1322-25 (1986). The Supreme Court has chosen to interpret its jurisdictional statute so as to refrain from passing on questions of state law, if doing so would result either in duplication or in unwarranted intrusion into predominantly local affairs.

18. *See* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 226-27 (1965). The proffered state basis must also be supported by the record. *Id. See also* Ward v. Board of County Comm'rs, 253 U.S. 17, 22-24 (1920), discussed infra note 296.

The Supreme Court has not unequivocally endorsed the view that states should be hobbled by their own prior rules of procedure. The decision in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930), disclaimed any intention of precluding retroactive changes in such rules. Justice Brandeis said that "the mere fact that a state court has . . . overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." *Id.* at 680. Nonetheless, petitioner was rescued by a constitutional due process analysis. The Missouri Supreme Court had refused to consider an equal protection tax claim on the grounds that plaintiff had no right to equitable relief because an adequate remedy at law—recourse to the State Tax Commission—had been ignored. *Id.* at 675-76. The United States Supreme Court reversed, finding that a denial of due process had occurred because the remedy before the State Tax Commission was nonexistent until the Supreme Court of Missouri created it in the case at bar, at a time when it was too late to invoke such a remedy. *Id.* at 677. Justice Brandeis concluded: "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682. Later Supreme Court analysis has emphasized the importance of precedent as a measure of the federally mandated goal of consistency. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457-58 (1958)

met, the Supreme Court may proceed to consider the federal claims.[19] The testing process as to ambiguous precedents, which involves a penetrating examination of state orders and rules, should serve as a model for adequacy determinations in other contexts.

Projecting respect for state institutions while striving to protect federal rights is a delicate operation. Consider the problem of assessing a discretionary decision by a state appeals court to review a federal issue that was not raised below—a later refusal to exercise such discretion in other similar instances could be characterized as invidious. Even if appellate forgiveness of default is accompanied by a full explanation,[20] the state court's subsequent unwillingness to overlook procedural errors of the same kind may become questionable. Because prior lenience might suggest that the cost of leniency is not daunting, why not follow suit where federal rights are at stake?

This demanding approach is illustrated in *Sullivan v. Little Hunting Park, Inc.*[21] The majority took the position that because the state had declined to use its previously exercised power to review a prof-

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(novelty in state procedural requirements will not bar review of federal constitutional rights where petitioner has justifiably relied upon prior decisions); *see also infra* notes 40-45 and accompanying text.

19. The statute providing for the Supreme Court's jurisdiction to review decisions of state courts is codified at 28 U.S.C. § 1257 (1988), *amended by* Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). Review by writ of certiorari may be accorded where:

> a) the validity of any federal statute or treaty is put in question by the decision;
>
> b) the validity of a state statute is put in question as being repugnant to the Constitution, laws or treaties of the United States; or
>
> c) the decision violates a right, privilege or immunity created by or claimed under the Constitution, treaties or statutes of the United States.

Id.

The finality requirement of § 1257 limits the Supreme Court to review of a state court judgment when such a judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

20. Unexplained ad hoc deviations from state rules could be more easily seized upon as evidence of inconsistency. *See* Sandalow, *supra* note 18, at 226 (concluding nevertheless that ad hoc discretion cases would not generally reach the United States Supreme Court).

21. 396 U.S. 229 (1969). Little Hunting Park was a Virginia nonstock corporation that provided a playground and community park for residents of Fairfax County. A membership share in the corporation entitled the holder to use these facilities and to assign the share to tenants, subject to approval by the board of directors. *Id.* at 234. Although the facilities had been open to any white person in the geographic area, a homeowner's assignment of a share to a black tenant was refused on racial grounds. The white owner of the house, who was expelled from the corporation for protesting this refusal, joined the black tenant in bringing suit for injunctive relief and damages.

fered federal claim, there was no adequate state ground supporting the judgment below.[22] The case challenged a refusal to allow a black family to use certain community facilities, and arose under 42 U.S.C. section 1982's guarantee that all citizens have the same right as a white person to lease, hold, or convey property.[23]

The Supreme Court of Virginia had denied the claimants' appeals because they were not perfected in accordance with a rule governing records on appeal.[24] "[O]pposing counsel was not given reasonable notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it."[25] The Virginia court twice found[26] that it had no jurisdiction to reach the substantive issue because of this procedural error.

The United States Supreme Court's ruling, contained in a few spare paragraphs, cited prior state decisions and concluded that although the "reasonable notice" barrier was not novel, its application had been discretionary rather than jurisdictional. That is, the court below had not been bound by its own law, but had simply decided to restrain itself.[27] In a convoluted sentence, the majority

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Id. at 235. The trial court concluded that Little Hunting Park was a private social club and dismissed the complaints. *Id.* at 236.

22. *Id.* at 233-34.

23. *Id.* at 234.

24. The Virginia Supreme Court of Appeals relied on former VA. SUP. CT. APP. R. 5:1, § 3(f) (1957), which required that the transcript be tendered to the trial judge within 60 days, and signed by him within 70 days of the final judgment. The rule further required that written notice of the time and place of the tendering be given to opposing counsel along with an opportunity to examine the transcript. 396 U.S. at 231 & n.1.

25. 396 U.S. at 231. Counsel for petitioner in *Sullivan* had sent transcripts to the judge on the 9th of the month, filing at the same time motions to correct, and requesting that the judge delay acting on the motions for 10 days in order to allow opposing counsel time to respond. The judge was absent from his chambers and did not receive the transcript until the 12th. The motions were heard on the 16th; thus there were 3 days remaining out of the original 10 in which counsel for respondent had the opportunity to examine the record. No objections were raised as to the corrections or the entry of orders granting the motions to correct, nor did respondent complain at the time of being deprived of a reasonable opportunity to examine the transcript. *Id.* at 232-33. Nonetheless, the appellate court ruled that this procedural error deprived the court of jurisdiction to hear petitioner's appeal. *Id.* at 231.

26. On the first occasion that *Sullivan* went to the Supreme Court on a petition for certiorari, the judgment was vacated and the case remanded for further consideration in light of Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). *Sullivan v. Little Hunting Park, Inc.*, 392 U.S. 657 (1968) (per curiam). On remand, however, the Virginia appellate court maintained that it had no jurisdiction to hear the appeal. Sullivan v. Little Hunting Park, Inc., 209 Va. 279, 281, 163 S.E.2d 588, 589 (1968). Thus, the issue was now before the Supreme Court for the second time, after the state court had in effect simply re-issued its prior decision. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 231 (1969).

27. 396 U.S. at 234.

found that earlier state cases "do not enable us to say that the Virginia court has so consistently applied its notice requirement as to amount to a self-denial of the *power* to entertain the federal claim here presented . . . ."[28] Thus, review by state certiorari was not precluded.

Justice Harlan's dissenting opinion agreed that Virginia had not demonstrated a valid basis for barring certiorari, but his conception of discretion differed from the majority's.[29] He concluded that a state court may validly exercise discretion pursuant to a general standard (such as reasonableness) which requires "a close analysis of the facts of a particular case in light of competing policy considerations."[30] Discretionary review could legitimately be granted in some instances and denied in others. In *Sullivan*, however, the denial was not legitimate because the circumstances too closely resembled earlier cases where leniency had been shown.[31] Petitioners

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28. *Id.* at 233-34 (emphasis in original). The Court went on to hold that Sullivan's membership share in Little Hunting Park was an integral part of the tenant's lease. *Id.* at 237. Thus, a racially discriminatory refusal of Sullivan's assignment constituted a violation of 42 U.S.C. § 1982 (1962). 396 U.S. at 237.

29. *See id.* at 243 (Harlan, J., dissenting).

30. *Id.* at 245 (Harlan, J., dissenting).

31. In his dissent in *Sullivan*, Justice Harlan noted that the Virginia Supreme Court of Appeals had applied a "standard of reasonableness much stricter than that which could have fairly been extracted from the earlier Virginia cases applying [VA. SUP. CT. R. 5:1, § 3(f) (1957)] . . . ." *Id.* at 245 (Harlan, J., dissenting). Justice Harlan concluded that the petitioners justifiably might have thought that their appeal would not be barred from review by the Supreme Court of Appeals based on the principle outlined in Bacigalupo v. Fleming, 199 Va. 827, 102 S.E.2d 321 (1958), and previous cases involving rule 5:1, § 3(f). 396 U.S. at 245-46 & nn.10 & 12 (Harlan, J., dissenting).

In *Bacigalupo*, the Supreme Court of Appeals interpreted the rule as requiring that opposing counsel be given a reasonable opportunity to examine the transcript after receiving notice and to object to the accuracy of the record before the judge signs it. 199 Va. at 835, 102 S.E.2d at 326. The trial judge is to make a reasonableness determination based on the particular facts of the case.

Relying on the *Bacigalupo* principle, the Virginia Supreme Court of Appeals found two days to be sufficient opportunity to examine the transcript. Cook v. Virginia Holsum Bakeries, Inc., 207 Va. 815, 816-17, 153 S.E.2d 209, 210 (1967); *see also* Bolin v. Laderberg, 207 Va. 795, 153 S.E.2d 251 (1967) (affirming the lower court's determination that a two-day opportunity to examine and object to the transcript was adequate).

On the other hand, in Snead v. Commonwealth, 200 Va. 850, 108 S.E.2d 399, *cert. denied*, 361 U.S. 868 (1959), the court found that a time period of 30 minutes did not satisfy the requirements of Rule 5:1, § 3(f). Justice Harlan distinguished *Sullivan* from *Snead*, noting the obvious difference in the opportunity for examination and objection before the judge signed the record. 396 U.S. at 246 n.13 (Harlan, J., dissenting).

In *Sullivan* the opposing counsel received oral notice on June 9, and written notice on June 12. He had the opportunity to examine the record in the judge's chambers between June 12 and June 16, and had actual possession of the record between June 16 and June 19. *Id.* at 245 n.12 (Harlan, J., dissenting). In light of the above discussion, Justice Harlan concluded that the petitioners were reasonable in believing they had sat-

might justifiably have assumed that the notice they gave was proper under prior precedents. Thus, Virginia's ruling was not predicated upon adequate state grounds.[32]

Subsequent decisions have stressed Justice Harlan's theme of unfair surprise[33] rather than the majority's distinction between discretion and jurisdiction. However, both opinions in *Sullivan* typify in one significant respect the Court's adequate-state-grounds analysis. They both scrutinized Virginia's position and all state precedents in order to protect litigants who "seek vindication in state courts of their federal . . . rights."[34]

In some instances, rejection of a procedural barrier has been buttressed by evidence of the state's hostility to constitutional guarantees. *NAACP v. Alabama ex. rel. Flowers*,[35] a pre-*Sullivan* decision, reviewed in great detail the Alabama Supreme Court's rule that "where unrelated assignments of error are argued together and one is without merit, the others will not be considered."[36] This rule had been the predicate for refusing to adjudicate federal issues raised in an NAACP brief filed in the Alabama courts.

Nine pages of the United States Supreme Court's unanimous opinion analyzed the brief and the state's handling of other assignments-of-error cases.[37] The decision concluded:

> Had the petitioner simply omitted the Roman numerals which subdivide its 'Argument' section, intended presumably as an organizational *aid* to understanding, there would have been no conceivable basis for the suggestion that the

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isfied Rule 5:1, § 3(f). Therefore, there was no adequate state ground for the decision of the Virginia Supreme Court of Appeals. *Id.* at 247.

32. 396 U.S. at 247 (Harlan, J., dissenting).

33. While a doctrinal change could be so unexpected that litigants would be deprived of the opportunity to comply, a novel ruling could also stem from misapplication rather than revision of existing doctrine. *See, e.g.*, Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1139 n.44 (1986); Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 969-71 (1965).

34. *Sullivan*, 396 U.S. at 247 (Harlan, J., dissenting) (quoting with approval from NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457-58 (1958)). The *Sullivan* majority also relied on NAACP v. Alabama *ex rel.* Patterson.

35. 377 U.S. 288 (1964).

36. *Id.* at 295 (quoting the decision of the Alabama Supreme Court, NAACP v. State, 274 Ala. 544, 546, 150 So. 2d 677, 679 (1963)).

37. *Id.* at 293-302. The Supreme Court of Alabama found at least one of the assignments of error in each subdivision of the argument section of the NAACP's brief to be without merit. On this basis, it refused to consider the merits of any other assignment. *Id.* at 290. The United States Supreme Court held that Alabama had not consistently applied its rules with this degree of rigidity. In case after case, Alabama courts had exercised discretion to consider the merits of issues not strictly presented in the prescribed form. *Id.* at 293-302.

> various errors were argued 'in bulk' . . . . The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense.[38]

Such painstaking methodology has also been used in situations where no games-playing by the state was identified.[39] Procedural barriers stem from a variety of factors. Some rules of procedure may simply be archaic; others might be generally fair but not fine-tuned to unusual cases.[40] Nonetheless, a neutrally generated rule that is not uniformly applied could unjustifiably deprive litigants of a hearing on the merits of a federal claim.

A consistency requirement facilitates certiorari review for such litigants without stigmatizing the court below.[41] In *Hathorn v. Lovorn*,[42] for example, Mississippi argued that petitioners' claim under the Voting Rights Act of 1965 was untimely and could not be heard.[43] The claim had never been raised until a petition was filed in the Mississippi Supreme Court requesting a rehearing.[44]

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38. *Id.* at 297 (emphasis in original). Similarly, James v. Kentucky, 466 U.S. 341, 349 (1984), found that the state was setting "springes" for a criminal defendant who had "plainly and reasonably" asserted his constitutional rights (quoting from Davis v. Wechsler, 263 U.S. 22, 24 (1923)). At trial in a Kentucky court, defense counsel had requested that the jury be told not to draw an adverse inference from defendant's failure to take the stand. The trial judge refused this request; defendant was convicted and sentenced to life imprisonment. The Kentucky Supreme Court conceded that defendant would have been entitled to an "instruction" to the jury on the issue. However, the court ruled that defendant had merely asked for an "admonition," which could properly be denied, and that his failure to avail himself of the right to an instruction was a procedural default constituting an adequate and independent state ground. *Id.* at 344.

This ruling was reversed. Justice White's majority opinion for the United States Supreme Court minutely parsed Kentucky's case law and rules, as well as the somewhat inadequate trial record, in holding that the defendant's alleged defect in form "must be more evident than it is here" in order to block further review. *Id.* at 351.

39. *See* Meltzer, *supra* note 33, at 1136.

40. *Id.*

41. The consistency test is useful for additional reasons. Professor Sandalow points out that this test, where satisfied, demonstrates that the state procedure is used to bar both federal and state claims, and is therefore nondiscriminatory in its purpose. Sandalow, *supra* note 18, at 221.

42. 457 U.S. 255 (1982).

43. *Id.* at 262. The claim was based on § 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1988). This section provides in relevant part that no change in voting practices or procedures can be put into effect unless the United States District Court for the District of Columbia has ruled that the modification does not have the purpose or effect of limiting the right to vote based on race, or of violating other guarantees provided in the Act. Any such proposal first must be submitted for approval to the Attorney General of the United States.

44. *Hathorn*, 457 U.S. at 260-61. In 1975, voters brought an action in state court to

The United States Supreme Court discounted Mississippi's position, ruling that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' "[45] Indeed, Justice O'Connor's sophisticated *Hathorn* analysis noted the vintage of the cases proffered by the state and pointed out that Mississippi's recent decisions often granted petitions for rehearing without concern about whether such petitions raised new issues.[46] The majority did not express any suspicion about the state's motives in the case at bar, but instead focused on the irregularity of the rule's implementation.

Thus, although the tone of the Supreme Court's adequate-state-ground opinions may modulate, the message is unmistakable. Extinguishing federal rights without a hearing is disfavored, and a state's assertion that its procedures are fairly applied does not preclude further exacting inquiry.

II. NEGLIGIBLE SCRUTINY: A PENDING STATE PROCEEDING AS AN ADEQUATE FORUM

The Supreme Court has explicitly discouraged evaluation of the state forum by district courts asked to enjoin pending state proceed-

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enforce a 1964 state statute, which had never been implemented, changing the mode of election of members of the Louisville District School Board. *Id.* at 258. The lower court dismissed the action, finding that the law violated the state constitutional bar to local legislation. *Id.* at 258-59. The Mississippi Supreme Court reversed, and also denied defendant local officials' petition for rehearing in which they argued for the first time that the statute could not be implemented until the change was pre-approved under § 5 of the Voting Rights Act. *Id.* at 259.

On remand, the trial court ordered an election pursuant to the statute but required the election plan to be submitted to the Attorney General for clearance. The Attorney General rejected the plan, and the trial court thereafter held the election in abeyance. *Id.* On appeal, the Mississippi Supreme Court ruled that its prior decision was the law of the case and that the trial court should not have conditioned the election on compliance with the Voting Rights Act. *Id.* at 260-61.

The United States Supreme Court granted certiorari, and rejected Mississippi's contention that reliance on the Voting Rights Act issue in the earlier petition for rehearing had been untimely. Recent Mississippi Supreme Court decisions had "regularly" considered issues raised for the first time in petitions for rehearing. *Id.* at 263. Thus, there was no adequate state ground which precluded review. Finally, the Supreme Court decided that no change in electoral procedures could be implemented until the requirements of § 5 had been met. *Id.* at 270-71.

45. *Id.* at 262-63 (quoting with approval from Barr v. City of Columbia, 378 U.S. 146, 149 (1964)). In *Barr*, the Supreme Court of South Carolina had refused to pass on objections to breach of the peace convictions arising out of a peaceful sit-in demonstration because the exceptions taken below were "too general" to be considered. The United States Supreme Court reversed, pointing out that identical exceptions had been considered in other cases during the same time period. 378 U.S. at 149.

46. 457 U.S. at 263.

ings.[47] In our prior hypothetical, Blue is litigating in both state and federal tribunals. He has commenced an action under section 1983, alleging that the pending state case will jeopardize his constitutional rights unless federal judicial aid is forthcoming. The district court judge rules that Blue's claim should be pursued in the state courts—a ruling implicitly predicated on the feasibility of this pursuit.

Logic would seem to dictate that if there were an ambiguity in state law, for example uncertainty as to whether the claim could be asserted as a defense or presented on appeal, federal intervention would be considerably more likely. However, the standards governing such intervention bear no kinship to the model used in parsing adequate-state-grounds claims.[48]

The Supreme Court affirmed in *Pennzoil Co. v. Texaco, Inc.*,[49] that district courts should presume that state remedies are adequate unless state procedures "plainly bar" presentation of the federal issue.[50] This casual approach is particularly problematic because the federal judiciary is instructed to dismiss arguably meritorious constitutional claims without regard for the fate of such claims in state tribunals.

Evaluation of *Pennzoil*'s rationale requires several steps: first, an overview of the nonintervention and abstention doctrines; second, an exploration of the tenuous position assigned to the adequate forum issue in nonintervention cases; and, finally, an analysis of a post-*Pennzoil* methodology for handling state provisions that are ambiguous or unreceptive to federal questions.

A. Nonintervention and Abstention: An Overview

Federalism concerns are neither new, nor solely a judicial invention. The Anti-Injunction Law[51] embodies a congressional ban against any federal court injunction to halt proceedings pending in a state court unless the case falls within one of the authorized exceptions listed in the act.[52] However, this statute itself could be re-

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47. *See* Younger v. Harris, 401 U.S. 37, 53-54 (1971); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 2 (1987).

48. *See infra* Part IV for full discussion of the similarities and differences between these two contexts.

49. 481 U.S. 1 (1987).

50. *Id.* at 14-15.

51. 28 U.S.C. § 2283 (1988).

52. The law provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.* This enactment dates back to a 1793 prohibition against the granting of writs of injunc-

garded as an exception to the policy expressed in 28 U.S.C. section 1343(3), which provides for district court jurisdiction "to redress" any deprivation of equal rights effectuated under color of state law. Concomitantly, section 1983 directs the district courts to entertain and determine constitutional and federal statutory issues.

1. The Younger *Decision: Nonintervention Because of a Pending State Proceeding.*—Congress has been far from unequivocal in its deference to the competence and impartiality of state courts. The Civil Rights Act,[53] a prime example of congressional skepticism, was promulgated to "interpose the federal courts between the States and the people."[54] However, *Younger v. Harris*[55] and its descendants instruct district courts to step aside when section 1983 plaintiffs are involved in pending state proceedings.

Harris was charged under a state criminal syndicalism statute, and challenged his indictment in federal court on the grounds that it chilled the exercise of his first amendment rights to discuss and teach unpopular views.[56] Justice Black's majority decision bypassed

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tion by federal judges to stay state court proceedings. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334-35. The exceptions were passed in 1948. *See* Act of June 25, 1948, ch. 646, § 2283, 62 Stat. 869, 968.

Congress has also deferred to the states in regulating the timing of federal habeas corpus relief, which cannot be granted unless the petitioner has first exhausted available state judicial remedies. 28 U.S.C. § 2254(b) (1988). The exhaustion requirement was absent in the 1867 statute granting federal habeas corpus to state prisoners. However, *Ex parte* Royall, 117 U.S. 241, 252-53 (1886), found that requirement to be implicit. The exhaustion rule was not codified until 1948. Law of June 25, 1948, ch. 646, § 2254, 62 Stat. 869, 967.

Another example of congressional deference is 28 U.S.C. § 1441(a) (1988), restricting removal of federal question cases from state tribunals to those that could have been filed in federal court in the first place.

53. 42 U.S.C. § 1983 (1988).

54. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (Congress "expressly authorized" federal courts to issue injunctions against state proceedings where state action, including that of state courts, was being used to harass or injure individuals). *See also* 28 U.S.C. § 1331 (1988) (giving federal district courts federal question jurisdiction); 28 U.S.C. § 1343(3)(1988) (giving the district courts jurisdiction over civil rights and constitutional claims).

55. 401 U.S. 37 (1971).

56. *Id.* at 38-41. Harris sued under 42 U.S.C. § 1983, charging that the California Criminal Syndicalism Act, under which he was indicted and being prosecuted, violated his first amendment rights to free speech and press. *Id.* at 39. The statute, CAL. PENAL CODE § 11400 (West 1982), outlawed teaching or advocating the necessity for committing crimes, sabotage, terrorism, or unlawful acts of violence as a means of accomplishing political change or change in industrial ownership or control. 401 U.S. at 38 n.1. The dissent concluded that Harris was prosecuted for "distributing leaflets advocating change in industrial ownership through political action." *Id.* at 60 (Douglas, J., dissenting).

the issue of whether the anti-injunction statute deprived the Court of the power to enjoin the pending state proceeding. Instead, the majority held that equity, comity, and "Our Federalism"—policies predating the statutory barrier—substantially restrict the discretion of federal district courts to intervene, even when a state prosecution proceeds under an unconstitutional statute.[57]

Younger was brought under section 1983. In a subsequent decision, *Mitchum v. Foster*,[58] the Supreme Court stated the obvious by holding that a subliminal premise in *Younger* was that section 1983 is one of the statutory exceptions to the Anti-Injunction Law and therefore no congressional obstacle prevented the granting of relief.[59] Nonetheless, *Younger* had already narrowly circumscribed federal district court discretion to accord such relief.[60] This prudential burden is a special feature of the Court's section 1983 jurispru-

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57. *Id.* at 43-44. "Our Federalism" refers to "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government [protects federal rights and interests] in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 44.

These policies will be considered in full, *infra* Part IV. At this juncture it is important to note the severity of the intervention restrictions imposed by the majority. The federal plaintiff must demonstrate bad faith, harassment, or some other extraordinary circumstance justifying equitable relief. *Id.* at 54. An illustration of such an exceptional circumstance was given: a statute "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . . ." *Id.* at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)). The Court also required a showing of "great and immediate" danger of irreparable injury, without explaining the extent to which such injury differs from the traditional equitable standard of irreparable harm. *Id.* at 46. *See* Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C.L. REV. 49, 57 (1987). Neither formulation would recognize the pain and expense of enduring a good faith legal proceeding as sufficient in itself to warrant an injunction. 401 U.S. at 54. Under any interpretation of the operative phraseology and multiple requirements for success, the federal plaintiff's burden is extremely high.

58. 407 U.S. 225 (1972).

59. *Id.* at 231. It was noted that the *Younger* majority would not have reached the difficult issue of discretion if it could have disposed of the litigation by citing a flat congressional ban on equitable redress. *Id.*

Mitchum squarely held that § 1983 was an "authorized exception" to the Anti-Injunction Law, because the purpose of § 1983 was to place the federal courts between the states and the people as guarantors of constitutional rights. *Id.* at 242. "In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." *Id.* Federal injunctive relief can sometimes be required to prevent "great, immediate, and irreparable loss of a person's constitutional rights." *Id.*

60. Another ironic point of contrast between the two cases was that the first decision, *Younger*, assumed that state courts are competent to carry out their responsibility to enforce the United States Constitution. 401 U.S. at 56-57 (Brennan, J., concurring). *Mitchum* rejected this assumption, and stressed the important role of federal district courts as ombudsmen. 407 U.S. at 242.

dence.[61] Other authorized exceptions to the Anti-Injunction Law, such as tax statutes,[62] have not been diminished by Supreme Court restrictions on judicial freedom to redress federal claims.

The reach of the nonintervention doctrine has been increasing. Justice Stewart's concurring opinion in *Younger* indicated that because the majority only addressed the limitations on interfering with state criminal prosecutions, future cases might affirm a broader freedom to intervene in state civil proceedings.[63] However, later Supreme Court holdings established that where a state has a vital interest in a pending civil proceeding, the *Younger* rule would apply. Many circumstances have been found to evidence such an interest: state actions that were quasi-criminal;[64] were initiated by the state itself to implement fiscal programs;[65] involved the powers of the

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61. While *Younger* involved a request for an injunction against pending state proceedings, its conclusions were also applied to declaratory relief in the companion case of Samuels v. Mackell, 401 U.S. 66 (1971). The author of this Article argued the *Samuels* case in the Supreme Court on behalf of New York State. The argument occurred eight years before Moore v. Sims, 442 U.S. 415, 426 (1979), presented the "clearly bars" standard, which reduced the possibility that the § 1983 plaintiff seeking intervention will be heard in any forum. *See infra* note 109 and section II(B)(1).

Justice Black, who had set out the majority view in *Younger*, also wrote the *Samuels* opinion. The federal plaintiff had been indicted under a state sedition statute that forbade advocating the overthrow of the state government by force. The law had been narrowly interpreted by New York's highest court as applicable only when the person charged intended to incite immediate action and when there was a clear and present danger that such action would occur. 401 U.S. at 68. Defendants were charged with planning to fire-bomb the subways and assassinate certain state officials. They had amassed a storehouse of weapons, including grenades and guns, which were discovered after a valid search. Samuels v. Mackell, 288 F. Supp. 348 (S.D.N.Y. 1968); 401 U.S. at 74-75 (Douglas J., concurring). Defendants requested a declaratory judgment that the state law violated constitutional rights to freedom of speech and association. The Supreme Court held that such a declaration would be as disruptive as an injunction. 401 U.S. at 73. If it were not to be treated as a mere piece of paper, the federal judgment would be respected by state officials and would, therefore, halt the prosecution. *Id.* at 69. Thus, plaintiffs were required to make the same showing as a litigant seeking injunctive relief.

62. *See infra* section II(B)(2).

63. 401 U.S. at 55 (Stewart, J., concurring).

64. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), where the operator of a theater showing obscene motion pictures brought a § 1983 suit in federal court, challenging a state court judgment that shut down the theater for a year under a nuisance statute. The district court enjoined the execution of a portion of the state judgment which closed the theater to films that had not been adjudged obscene. The Supreme Court held that *Younger* abstention applied to a civil proceeding which was similar to a criminal prosecution, *id.* at 604, and that the plaintiff must litigate in state court or show that one of the exceptions to the *Younger* doctrine applied in order to litigate in federal court. *Id.* at 609.

65. *See* Trainor v. Hernandez, 431 U.S. 434 (1977), discussed in detail *infra* section II(B)(2).

state courts;[66] or addressed important concerns such as disciplining attorneys.[67] Disruption of state administrative proceedings was similarly restricted.[68]

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66. *See* Juidice v. Vail, 430 U.S. 327 (1977), where appellees were held in contempt after they failed to satisfy judgments against them, and were fined and imprisoned for failure to obey subpoenas. In response to their challenge under § 1983, the district court enjoined the enforcement of the contempt procedures. The Supreme Court reversed, holding that comity and federalism require federal abstention where a state's contempt process is involved; interference was an affront to the state's legitimate activities and a negative reflection on the state court's ability to enforce the Constitution. *Id.* at 335-36. Because appellees had an opportunity to present their constitutional claims and no exceptions in the *Younger* doctrine applied, the district court should have abstained from enjoining the state's contempt procedures. *Id.* at 337.

67. *See* Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982), where such discipline was found to be a significant state interest. *Middlesex* is discussed in detail *infra* note 109.

68. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986). Justice Rehnquist's opinion for the Court held that *Younger* would require abstention in deference to state administrative proceedings involving important state interests if these proceedings gave federal plaintiffs a "full and fair opportunity" to present their constitutional claims. *Id.* at 627. Even if there is doubt that the administrative tribunal could itself dispose of constitutional issues, it is sufficient that such issues could be vindicated as part of the state's judicial review.

In *Dayton*, a pregnant teacher was told that her contract to teach in a private school would not be renewed because of the school's policy that mothers should remain at home with preschool-aged children. When she threatened to sue the school under state and federal nondiscrimination legislation, she was terminated for violating an "internal resolution" clause in her contract. *Id.* at 623. Based on the teacher's complaint, the Ohio Civil Rights Commission initiated administrative proceedings against the school, which defended on the basis of first amendment religious guarantees. The school then commenced suit in the federal district court, seeking to enjoin the pending administrative proceedings. *Id.* at 624. The district court denied the request for injunctive relief, ruling that the Commission's proposed action would not violate the first and fourteenth amendments. The United States Supreme Court held that under *Younger*, the district court should have abstained because plaintiff could raise the constitutional issues in the state courts. *Id.* at 625.

In a footnote the Court addressed situations where administrative proceedings are too informal to merit deference: "Of course, if state law *expressly* indicates that the administrative proceedings are not even 'judicial in nature,' abstention may not be appropriate." *Id.* at 627 n.2 (emphasis added). This formula seems to echo the "plainly bars" approach, but the Court's emphasis on appellate review as a cure for deficiencies in the lower tribunal makes any informality objection to that tribunal less significant.

A somewhat more problematical point in *Dayton* was whether the rejection of a § 1983 plaintiff's request for an injunction against continuation of a state administrative proceeding creates an exhaustion of remedies requirement. Such a requirement had been expressly invalidated in prior Supreme Court decisions such as Patsy v. Board of Regents, 457 U.S. 496 (1982). Justice Rehnquist's *Dayton* opinion notes that "[u]nlike *Patsy*, the administrative proceedings here are coercive rather than remedial . . . . " 477 U.S. at 628 n.2.

This casually described distinction was explained by the Second Circuit in University Club v. City of New York, 842 F.2d 37 (2d Cir. 1988), where private membership clubs sought a declaration that certain antidiscrimination amendments to the city's human rights laws were unconstitutional and an injunction prohibiting the city's Human

The impact of this forum allocation is especially troubling in civil controversies. Although criminal prosecutions would probably not accord interim or class relief,[69] such proceedings generally provide an opportunity for a defendant to present constitutional challenges to both the evidence introduced and the statute underlying the indictment. By contrast, civil cases rerouted from federal to state courts could fall between the cracks. In these instances, state forum review of federal claims will be unavailable, uncertain, or inordinately delayed within an ambiguous procedural framework.[70]

2. Temporary Abstention Where No Pending State Proceeding Is Interrupted.—Application of *Younger*'s nonintervention rule to a Civil Rights Act case leads to dismissal of the complaint. The term "abstention," though sometimes used in the *Younger* context,[71] more precisely refers to a temporary withholding of federal power.

This postponement of federal review may occur when a section 1983 litigant contends that she must forego the exercise of constitutional rights or risk future prosecution under an unclear state statute. Her request for a declaration striking down this statute as unconstitutional is not governed by *Younger* restrictions, which are applicable only to equitable relief that would disrupt pending proceedings.[72] Here, prosecution is threatened but has not com-

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Rights Commission from enforcing the amendments. Judge Pratt's opinion first established that civil proceedings can be coercive because they may culminate in civil penalties. *Id.* at 42. Secondly, the court concluded that the Commission's proceedings were coercive, rather than providing remedies for Union League. *Id.* Abstention was approved after a careful review of state procedures available to challenge any order the Commission might issue. Adequacy was not measured against a "plainly bars" rubric, but instead was examined empirically.

69. *See* Laycock, *supra* note 4. Monetary relief would also be unavailable; *see infra* subpart II(C).

70. *See, e.g.*, Vairo, *supra* note 4, at 194-97.

71. *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 9 n.9 (1987), where the Court notes that the various kinds of abstention need not be rigidly differentiated because they are based on similar considerations. *But see* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 n.13 (1972) (concluding that abstention is an entirely different question than the appropriateness of granting injunctions or declarations).

72. In 1908, the Supreme Court approved the granting of injunctive relief by federal courts against future enforcement of unconstitutional state statutes. *See Ex parte* Young, 209 U.S. 123, 145, 148 (1908). The dissent objected that this holding reduced the states to mere dependencies of the federal government. *Id.* at 175 (Harlan, J., dissenting).

As subsequent decisions have stressed, the threat of prosecution must be more than speculative. The federal plaintiff must satisfy the traditional burden of demonstrating irreparable harm. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 712 (1977); Steffel v. Thompson, 415 U.S. 452, 466 (1974); Dombrowski v. Pfister, 380 U.S. 479, 484-85 (1965); Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 50 (1941); Cline v. Frink Dairy Co., 274 U.S. 445, 451 (1927). It also should be noted that if a state official commences

menced. Yet, the district court could insist that state clarification of the challenged law must precede federal consideration.

Under the abstention doctrine developed in *Railroad Commission of Texas v. Pullman Co.*,[73] plaintiff would be directed to ask the state judiciary to construe the statute so as to modify or obviate the constitutional question. This approach saves federal judicial time and permits self-correction by the states,[74] but is appropriate only where

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a prosecution "before any proceedings of substance on the merits" have occurred, *Younger* applies. Hicks v. Miranda, 422 U.S. 332, 349 (1975).

The *Ex parte Young* doctrine, that federal courts may issue equitable relief against imminent state proceedings, was further refined in Steffel v. Thompson, 415 U.S. 452, 460-62 (1974). Plaintiff had been threatened with arrest for distributing antiwar leaflets in a shopping mall; his companion had actually been arrested for handing out these leaflets in the same location. Steffel claimed violations of his first and fourteenth amendment rights and requested declaratory relief. Justice Brennan's opinion for a unanimous court noted that because Steffel was not being prosecuted himself, review of these claims would neither create duplicative proceedings, nor imply a slur against the ability of state courts to determine constitutional questions. *Id.* at 462. Steffel therefore did not have to meet the stringent *Younger* requirements in order to invoke federal assistance. These requirements applied only to injunctions or declarations that would disrupt pending state actions. *Id.* As discussed *supra* note 61, *Samuels* held that the standard for obtaining declaratory relief was the same standard as the one for obtaining an injunction in cases where according relief to the federal plaintiff would interrupt a state proceeding. By contrast, Steffel's burden in obtaining federal review was simply to satisfy the Declaratory Judgments Act, 28 U.S.C. §§ 2201-2202 (1982), by showing that because he was being compelled to contravene state law, or forego what he believed to be his constitutional rights, he had a vital interest in a district court declaration. 415 U.S. at 462, 475. *But see* Rizzo v. Goode, 423 U.S. 362, 366 (1976), where Philadelphia citizens alleged persistent violations of the rights of blacks by police. The Mayor and Police Commissioner were named as defendants. The Supreme Court held that principles of federalism blocked the issuance of an injunction against those in charge of an executive branch of a state or local agency. *Id.* at 366.

73. 312 U.S. 496 (1941).

74. In *Pullman*, the issue was whether a federal court could enjoin application of the Texas Railroad Commission's rule that each sleeping car operating in the state must have a conductor. The district court issued the injunction at the request of the Pullman Company, the railroads, and the black Pullman porters who would have lost their positions to white conductors. The district judge did not rule on plaintiffs' constitutional arguments but found that Texas statutes did not empower the Commission to enact the rule in question. *Id.* at 499.

The United States Supreme Court held that the Supreme Court of Texas was the final authority on that state's law, and that the federal judiciary should abstain from exercising jurisdiction in areas in which substantive state law is not settled. *Id.* at 500. Rather than proceeding to the merits, the district judge should have retained jurisdiction while plaintiff obtained the state's interpretation of the Texas provisions. *Id.* at 501-02.

Another timesaving doctrine was developed by the Supreme Court in Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). In the interests of judicial administration, a district court may conserve its judicial resources and permit the state courts to resolve the issue. *Id.* at 817. However, this doctrine is predicated on the availability of a merits determination in the state forum, because it

the ambiguous law is "obviously susceptible of a limiting construction."[75] Moreover, *Pullman* contemplates return of the federal plaintiff to the district court once an interpretation of the statute has been issued by the state judiciary.[76]

Abstention, in its original sense, is not a final disposition that bars federal review of constitutional questions. For *Younger* cases where district courts are unable to determine whether federal issues will be heard in a pending state action, *Pullman* suggests a useful option. If trial or appellate provisions are amorphous, federal jurisdiction can be retained until state tribunals clarify the meaning of their procedures. Where the clarification shows that the state forum will address the federal claims, the section 1983 suit can be dismissed.[77] While this option does not guarantee a federal disposition on the merits, a hearing in some forum is assured.

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applies where essentially the same property, and some of the same parties and legal questions, are involved in both federal and state litigation. The state tribunal is in a position to issue a comprehensive determination that avoids piecemeal litigation. *Id.* at 817-18.

75. City of Houston v. Hill, 482 U.S. 451, 468 (1987). *See also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984); Harman v. Forssenius, 380 U.S. 528, 535 (1965). However, Justice Blackmun's concurrence in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 29 (1987) (Blackmun, J., concurring), indicated that the chance of a construction that might obviate the constitutional issue should be sufficient to trigger *Pullman* abstention.

It has also been suggested that unless state courts could construe the statute in one proceeding, the federal court should exercise its jurisdiction so as to avoid piecemeal litigation. Baggett v. Bullitt, 377 U.S. 360, 378 (1964).

76. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), where the district court abstained to give the federal plaintiffs posing a constitutional challenge to a Louisiana statute the opportunity to obtain an authoritative state interpretation of this provision. Plaintiffs believed that they were required to litigate both state and federal claims in the state courts. When they attempted to return to the federal district court after losing in the state litigation, the district judge dismissed the action because the Louisiana courts had passed on all the issues. *Id.* at 414. The Supreme Court reversed, but in doing so established new ground rules for future *Pullman* litigants. To avoid forfeiting the right to return to the district court, a federal plaintiff must inform the state courts what his federal claims are in order to facilitate construction of the statute in light of this challenge. *Id.* at 421. However, he must carefully avoid submitting the federal issues to state tribunals for disposition. *Id.* at 420. Once an interpretation of the statute is obtained, plaintiff may again ask the federal court to rule on its validity.

77. For an illustration of this option, see *infra* Part V. Offense to the state by virtue of merely retaining jurisdiction would hardly outweigh the risk that dismissal would leave the federal plaintiff without any forum. If the state's interpretation of its procedures is not sufficiently reassuring, the federal judge could hold the case until the pending state action disposes of the federal claims. At that point, the § 1983 suit would be terminated by the welcome res judicata effect of the state judgment. *Cf.* analysis *infra* subpart II(C) of Deakins v. Monaghan, 484 U.S. 193 (1988), arguably a precedent for retaining jurisdiction where interim relief is needed because state consideration of federal issues may be inordinately delayed.

B. Ambiguity and the Adequate State Forum in Nonintervention Cases

A standard for evaluating the "adequacy" of a pending state proceeding might have been predicated on realistic scrutiny. For example, the Supreme Court could have ruled that dismissal of section 1983 litigation is permissible only when a state hearing on the merits of the federal claims is probable. Alternatively, district judges could have been invited to take a case-by-case approach.

The "plainly bars" formulation has been chosen instead, signalling to the federal judiciary that the question of adequacy may be viewed with studied indifference. Even if this formulation is not read literally, issues essential to federal-state forum allocation are left unresolved.

1. The Pennzoil *Case.*—A particularly revealing rendition of the Supreme Court's adequate-state-procedure analysis is found in *Pennzoil v. Texaco*. Texaco had the distinction of being the losing party in a suit which culminated in the largest damage award in American history—$10.53 billion, plus interest.[78] By a ministerial procedure under Texas law, Pennzoil could have proceeded after judgment to secure a lien on Texaco's real property within the state.[79] A writ of execution against Texaco's assets could also have been obtained from the clerk of the court issuing the judgment.[80]

The catalyst for Texaco's request for federal intervention was a state rule providing that execution of a money judgment may be suspended only if the debtor posts a bond for the amount of the judgment, plus interests and costs.[81] This would have exceeded $13 billion and, because the company did not have the capacity to raise such a bond, the business community anticipated that enforcement of the judgment would commence before state appellate courts could rule on the merits of the dispute.[82] The company's credit and the price of its stock were affected severely.[83] Prior to the entry of judgment, Texaco filed an action in the federal district court in White Plains, New York (the site of its corporate headquarters) seeking an injunction against execution of the judgment pending its ap-

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78. *See* Lewin, *Pennzoil-Texaco Fight Raised Key Questions*, N.Y. Times, Dec. 19, 1987, at 44, col. 1. A Houston, Texas jury arrived at this verdict on the basis of Pennzoil's claim that Texaco had "tortiously . . . induced Getty [Oil Company] to breach a contract to sell its shares to Pennzoil . . . ." *Pennzoil*, 481 U.S. 1, 4 (1987).

79. *Id.*; *see* TEX. PROP. CODE ANN. §§ 52.800-.806 (Vernon 1984).

80. 481 U.S. at 4; *see* TEX. R. CIV. P. ANN. r. 627 (Vernon 1990).

81. 481 U.S. at 5; *see* TEX. R. CIV. P. ANN. r. 364(b) (Vernon 1990).

82. 481 U.S. at 5.

83. *Id.*

peal in the Texas courts.[84]

The company succeeded in the United States District Court for the Southern District of New York and, on a narrower basis, in the Court of Appeals for the Second Circuit.[85] The district court judge issued a preliminary injunction restraining Pennzoil from taking steps to execute the judgment,[86] lowered the bond to $1 billion, and concluded that Texaco's constitutional claims had "a very clear probability of success" in the state appeal.[87] The circuit court ruled that the exercise of federal jurisdiction was proper as to the claim that the Texas bond and lien laws violated due process and equal protection.[88] *Pullman* abstention was inapplicable because the relevant bond provisions were clear and had been rigidly applied by prior Texas decisions.[89] Nonintervention under *Younger* was also ruled inappropriate, both because the state interest in the proceeding was not substantial enough[90] and because Texas did not have "adequate procedures for adjudication of Texaco's federal

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84. *Id.* at 6.

85. *Id.* at 7, 14; *see Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250 (S.D.N.Y.), *aff'd*, 784 F.2d 1133 (2d Cir. 1986), *rev'd*, 481 U.S. 1.

86. 481 U.S. at 6 n.5. On the same day that Texaco filed its federal complaint, judgment was entered against Texaco by the local Texas court.

87. *Id.* at 8 n.7. The district court held that the Anti-Injunction Act did not apply to Texaco's request, which was based on § 1983. *Id.* at 7. Under the Supreme Court's decision in Mitchum v. Foster, 407 U.S. 225, 242 (1972), § 1983 is an exception to the Act. *See supra* note 59. The Court also concluded that the injunction would not interfere with Texas' fundamental interests and, therefore, *Younger* did not apply. *Id.* at 7.

88. *Id.* at 8. These claims were not "inextricably intertwined" with the state court action on the merits, and therefore did not fall within the prohibition of what is commonly phrased as the *Rooker-Feldman* doctrine. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), held that federal district court review cannot be used as a substitute for appeal from a state trial court to state appellate tribunals.

89. Texas courts have refused to reduce supersedeas bonds below the amount dictated by rule 364 even though the party seeking to appeal the decision claimed he could not post the required amount. *See* TEX. R. CIV. P. ANN. r. 364 (Vernon 1990).

> Indeed, Rule 364's predecessor was similarly construed by Texas courts [in a decision] . . . refusing to stay foreclosure and sale of [the] home of [a] 66-year-old woman, whose only income was her old-age pension, because she could not post [a] supersedeas bond equal to the value of [her] house . . . .

Texaco, 784 F.2d at 1148 (2d Cir. 1986) (citations omitted), *rev'd*, 481 U.S. 1.

90. *Id.* at 1149. The court held that *Younger* required three preconditions: 1) the presence of "important," "substantial" or "vital" state interests; 2) an adequate opportunity for appellant to press his federal claims in state court; and 3) a state proceeding in process. *Id.* The circuit court found that if minor state interests were recognized, this would in effect vitiate § 1983's exempt status under the Anti-Injunction Act. *Id.* at 1149-50. It also found that Texaco could not effectively pursue its constitutional claims in the state courts in timely fashion. *Id.* at 1150-51.

claims."[91]

Reviewing these procedures, the Second Circuit noted that the Texas trial judge had no power to alter the mandatory bond and lien rules and would soon lose jurisdiction of the case.[92] Although the state's highest court could issue mandamus to the lower courts, such an exercise of special discretion was not sufficiently "certain" to justify abstention.[93] Thus, ambiguity in the Texas provisions could not be discounted in a case where irreparable harm was imminent.[94]

The Supreme Court reversed in a decision that highlighted *Younger*, but periodically infused the *Pullman* rationale.[95] An often-quoted portion of *Younger*'s comity analysis was used as a framework for the conclusion that the federal judiciary should have abstained: "a proper respect for state functions [requires] . . . a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . ."[96]

The *Pennzoil* Court also made a glancing reference to the equity underpinnings of *Younger*—the "basic" doctrine that no injunction should issue when the movant has an adequate remedy at law.[97] Efficiency was cited as a separate abstention ground, because a federal opinion on state provisions is not binding on state courts and there-

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91. *Id.* at 1150.

92. *Id.* at 1150-51. Pennzoil argued that Texaco could apply for a writ of mandamus from the Texas Supreme Court ordering the trial court not to demand posting of the bond. The Second Circuit found this unacceptable in view of the discretionary and exceptional nature of this state procedure, which would not offer Texaco a timely remedy. Further, even if the writ were granted, it would not necessarily require the lower court to stay execution. *Id.* at 1151.

93. *Id.*

94. *Id.* at 1152. The court found that enforcement of the lien and bond provisions of Texas law would rapidly produce substantial harm, because Texaco would be unable to post the required $12 billion security. The company could not continue operating and would be forced into bankruptcy with consequent layoffs of many of its employees and heavy losses to stockholders. Injunctive relief was granted; indeed the circuit court held that the record sustained the issuance of a permanent injunction, so no remand to the district court was necessary. *Id.* at 1156.

95. A footnote to the opinion stated that *Pullman* abstention would not be considered dispositive, because appellant had not pressed this argument in the Supreme Court. *Pennzoil*, 481 U.S. at 11 n.9. Justice Blackmun's concurrence, however, suggested that the Texas statutes at issue presented "unsettled questions of state law," and that abstention to allow the state courts to interpret the challenged provisions might obviate or alter the constitutional issues presented. *Id.* at 29 (Blackmun, J., concurring).

96. *Id.* at 10 (quoting with approval from *Younger*, 401 U.S. at 44). The Court found that Texas had a vital interest in this civil litigation because it involved administration of the state's judicial system and compliance with state judgments. *Id.* at 12-13.

97. *Id.* at 15-17. *See infra* full analysis of the equity rationale at subpart IV(B).

fore may become outdated and superfluous if the state disavows it.[98]

Equity and efficiency concerns were blended in the Court's discussion of Texas law. Justice Powell's opinion implied that because Texaco did not present its constitutional claims to state tribunals,[99] there could be no certainty that Texas provisions actually placed the company in the position of forfeiting its appeal in order to shield its assets. Furthermore, the Texas Constitution's "open courts" provision, which generally refers to citizen access to the courts and "remedy by due course of law,"[100] could have been invoked as a basis for addressing Texaco's grievance.

Thus, state law might provide a remedy for the company's inability to raise a $13 billion bond, obviating any need for a federal injunction. An injunction would in any event be inefficient because the federal constitutional question might be avoided by deferring to the state.[101] The influence of *Pullman* is as apparent in this reasoning as that of *Younger*; ambiguity in Texas law was pivotal to Justice Powell's conclusions.[102]

Lack of clarity was also a central theme in Texaco's argument, but with a reverse refrain. It was not the appeal bond requirement of Texas that was ambiguous, calling for abstention. Rather, it was the state's procedural framework for considering the constitutional claims that was tenuous, calling for federal intervention to prevent immediate irreparable injury.[103]

Close analysis of the Court's response to Texaco's inadequate-procedures argument is instructive. On the rhetorical level, inflexible key phrases emerge. The federal plaintiff should rely on his defense in the state courts, unless it "plainly appears" that he is barred from doing so.[104] Unless there is "unambiguous authority to the contrary," the adequacy of the state forum should be assumed.[105]

On a second level, the Court's caution is evident. It hedged the opinion by using multiple negatives: "[T]here is no basis for con-

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98. 481 U.S. at 11.

99. *Id.*

100. *Id.* at 12 n.10. The Texas Constitution declares: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.

101. 481 U.S. at 12.

102. *See supra* note 95.

103. *See supra* note 89.

104. 481 U.S. at 14 (citing Moore v. Sims, 442 U.S. 415, 432 (1979)). *See infra* discussion at note 109.

105. Justice Powell stressed that Texaco had not tested the waters by presenting its claim to the state courts. 481 U.S. at 15.

cluding that the Texas law and procedures were so deficient that *Younger* abstention is inappropriate."[106]

On a third, more expository level, Justice Powell's opinion specifically refers to these Texas procedures, citing rulings that generally prohibit making a remedy "contingent on an impossible condition."[107] The *Pennzoil* decision acknowledged that Texaco was urgently requesting "prompt" relief, but countered by indicating that such relief could have been forthcoming from the state courts if the company had trusted them at the outset.[108]

Although the Court described state provisions, its standard for evaluating the effectiveness of such provisions discourages district court inquiry into state forum adequacy. The "plainly bars" rubric is even more rigid than a prior formulation in *Moore v. Sims*,[109] which

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106. *Id.* at 17. This sentence is the converse of an equally awkward sentence in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 233-34 (1969), concluding that ambiguity should be resolved against the state. *See supra* note 28, and accompanying text.

107. 481 U.S. at 15. Here, Justice Powell quoted from Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984). He also suggested that because rule 364, governing posting of bonds, applies "*unless otherwise provided by law*," the bond requirement could be suspended if the Texas trial court decided that its application would violate the United States Constitution. *Id.* at 16 n.15 (emphasis in original); *see* TEX. R. CIV. P. ANN. r. 364 (Vernon 1990). Even if the trial court had lost jurisdiction over the case, higher courts might have had authority to effect such a suspension to defend their appellate jurisdiction. 481 U.S. at 16 n.16.

108. *Id.* at 16. This approach did not deal directly with Texaco's perception that the probability of a catastrophic bankruptcy was far greater than the chance of an expeditious constitutional ruling in the state forum. Justice Brennan's concurring opinion, however, cheerfully noted that "[w]hile Texaco cannot . . . be arbitrarily denied the right to a meaningful opportunity to be heard on appeal, this right can be adequately vindicated even if Texaco were forced to file for bankruptcy." *Id.* at 18.

109. 442 U.S. 415 (1979). *Moore* involved a challenge to Texas statutes governing the removal of battered children from their parents' household. Initially, a three-judge federal district court granted an injunction against further state proceedings. It held that *Younger* abstention was unwarranted because of the "multifaceted" pending Texas civil action, as to which "there is no single state proceeding in which the plaintiffs may look for relief on constitutional or any other grounds." Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179, 1187 (S.D. Tex. 1977). This finding focused attention on the possibility that plaintiffs' claim would be homeless without federal aid, rather than on the traditional exceptions to *Younger* abstention. *See supra* section II(A)(1). The United States Supreme Court reversed, using the "clearly bars" language and concluding that the federal plaintiffs had failed to avail themselves of an opportunity to present their claim in the pending proceeding, using a counterclaim as a vehicle. *Moore*, 442 U.S. at 25-26 & n.9.

A subsequent ruling, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982), invoked *Moore's* "clearly bars" language in the context of a federal challenge to a pending state attorney disciplinary proceeding. *Id.* at 432. Plaintiffs, a lawyer and three organizations of attorneys, had persuaded the Third Circuit that the disciplinary proceeding did not afford a meaningful opportunity to present their constitutional claims. *See* Garden State Bar Ass'n v. Middlesex County Ethics Comm., 643

hatched the phrase "clearly bars." The word "clearly" would allow a section 1983 plaintiff to interpret state law for the purpose of demonstrating that his federal claims would not be considered. The word "plainly" implies that unwillingness to hear these claims must virtually be explicit in state law in order to trigger federal review on the merits.

The use of such bald terminology is troubling for several reasons. If state legislation is amorphous, plaintiff will find it difficult to demonstrate a plain bar unless the state's highest court has interpreted the provisions and acknowledged such an obstacle. To say that the burden is on the federal plaintiff to demonstrate the inadequacy of the state forum does not provide guidance on how to evaluate that burden's weight.[110] Yes, it is heavy—but in other contexts more precise scales have been judicially developed.[111] Moreover, district judges who read between the lines of *Pennzoil* and undertake

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F.2d 119 (3rd Cir. 1981). In a unanimous opinion, the Supreme Court found that the New Jersey Supreme Court would entertain the constitutional issues, and would consider making review of attorney disciplinary matters an explicit part of its own rules. 457 U.S. at 430. Prior to the petitioning of the Supreme Court for certiorari, the New Jersey Supreme Court sua sponte examined the federal questions. *Id.* at 436.

It is interesting to note that both *Moore* and *Middlesex County* cited with approval Gibson v. Berryhill, 411 U.S. 564 (1973), a case in which abstention was found to be unwarranted, even though state law did not explicitly bar litigation of the federal plaintiffs' claims. *See Moore*, 442 U.S. at 425; *Middlesex County*, 457 U.S. at 432. In *Gibson*, licensed optometrists brought a § 1983 action requesting a federal injunction against continuation of hearings before the Alabama Board of Optometry. The Board was considering charges of unprofessional conduct against the federal plaintiffs under an Alabama optometry statute because they were employed by a corporation rather than practicing independently. 411 U.S. at 567-70. The United States district court found that the Board's aim was to revoke the licenses of any optometrist who worked for a business entity, which would have affected half of the practitioners in the state. *Id.* at 571, 578. Since the Board was composed entirely of optometrists in private practice, this delicensing plan would have personally benefitted the Board members. The district court issued the requested injunction on the grounds, among others, that the Board was constitutionally disqualified from considering the charges against the federal plaintiffs. *Id.* at 578-79. In a statement firmly conditioning *Younger* abstention on the existence of an adequate state alternative, the Supreme Court held:

> *Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims . . . to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for . . . the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it.

Id. at 577.

110. It is somewhat circular to contend that the burden (the degree of persuasiveness of plaintiff's evidence) is synonymous with the fact to be proven (state law plainly bars redress).

111. For a thorough discussion of burdens of proof such as preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt, see Un-

to review state law ambiguity will still face basic unresolved questions about how complete and available "adequate" redress must be.

2. The Unresolved Questions: Speed and Efficiency of the Remedy.—If a federal plaintiff might obtain eventual relief in a pending state proceeding, is the adequacy requirement satisfied? *Pennzoil* appears to answer this question with an enthusiastic affirmation. Yet, Congress has explicitly rejected such an approach as to cases involving the Tax Injunction Act,[112] which precludes district courts from enjoining state tax collections only if that state provides a "plain, speedy and efficient remedy."[113]

It might be argued that a looser standard is applicable where a plaintiff invokes a statute without such a specification. Or, the effectiveness criterion could be read into section 1983, which was passed in order to "interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ."[114] Such a reading would parallel and implement the Supreme Court's conclusion in *Mitchum v. Foster* that section 1983 is an "expressly authorized" exception to the Anti-Injunction Law.[115] This conclusion was reached even though the text of section 1983 does not explicitly permit district courts to enjoin pending state proceedings. *Mitchum* reasoned that preserving the power to intervene in state suits was essential to accomplishment of the congressional purpose in promulgating the civil rights legislation.[116]

In the framework of federal challenges to state tax assessments, the Supreme Court has methodically tested the promptness and effectiveness of available state remedies.[117] This approach was translated into a section 1983 context in the pre-*Pennzoil* case of *Hernandez*

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derwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1303 (1977).

112. 28 U.S.C. § 1341 (1988).

113. *Id.* The Act reads in full: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the court of such State." *Id.*

114. Mitchum v. Foster, 407 U.S. 225, 242 (1972). *See supra* note 59.

115. 407 U.S. at 243. For a description of the Anti-Injunction Act, see *supra* note 52.

116. 407 U.S. at 242. *See supra* note 59.

117. *See, e.g.*, Tully v. Griffin, 429 U.S. 68, 73-74 (1976). This test has been used not only as to requests for injunctive relief, but also where federal courts have been asked for a declaratory judgment that a state tax assessment is void. *See* Hillsborough v. Cromwell, 326 U.S. 620, 622 (1946); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943).

v. Finley.[118] In *Hernandez*, the federal plaintiffs were also defendants in a pending civil suit brought by the Illinois Department of Public Aid, which sought return of public assistance funds on the ground that assets had been fraudulently concealed.[119]

In that earlier phase, a three-judge federal district court had held that parts of the Illinois Attachment Act that subjected plaintiffs to prejudgment seizure of their property violated the fourteenth amendment's due process clause.[120] All Illinois court clerks and sheriffs were enjoined from issuing or serving writs of attachment.[121] The United States Supreme Court reversed, ruling in *Trainor v. Hernandez*[122] that

> disruption of suits by the State . . . when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending . . . proceeding, leads us to the conclusion that the interests of comity and federalism on which *Younger* . . . primarily rest[s] apply in full force here.[123]

Justice Stevens dissented, arguing that abstention would be inappropriate unless state procedure affords speedy and certain relief.[124] The majority did not dismiss the case, however. It sent back to the district court the question of whether the federal plaintiffs could have presented their constitutional claims in the pending state proceeding.[125]

On remand in *Hernandez v. Finley*, the district court found that in order to prevent the plaintiffs from continuing their federal litiga-

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118. 471 F. Supp. 516 (N.D. Ill. 1978), *aff'd mem. sub nom.* Quern v. Hernandez, 440 U.S. 951 (1979).

119. Hernandez v. Danaher, 405 F. Supp. 757, 758-59 (N.D. Ill. 1975), *rev'd sub nom.* Trainor v. Hernandez, 431 U.S. 434 (1977).

120. *Id.* at 762.

121. *Id.*

122. 431 U.S. 434 (1977).

123. *Id.* at 446.

124. *Id.* at 469 n.15 (Stevens, J., dissenting).

> There should be no abstention unless the state procedure affords a plain, speedy, and efficient remedy for the federal wrong; indeed . . . *Younger* . . . acknowledges this as the fundamental requirement in application of the abstention doctrine. . . . In my judgment, when a state procedure is challenged, an adequate forum must be one that is sufficiently independent of the alleged unconstitutional procedure to judge it impartially and to provide prompt relief if the procedure is found wanting . . . . [W]here the remedy is 'uncertain,' federal jurisdiction exists.

Id. For a discussion of Justice Stevens' dissent, see Comment, *Limiting the* Younger *Doctrine: A Critique and Proposal*, 67 CALIF. L. REV. 1318, 1345-46 (1979).

125. 431 U.S. at 447-48.

tion, the state must provide a competent tribunal to determine the federal issues, certainty in the availability of relief, and a "meaningful opportunity to appeal."[126] Nonintervention principles were inapplicable because Illinois provisions governing the hearing and appeal of challenges to the prejudgment attachments did not afford a speedy and certain remedy.[127] The Supreme Court summarily affirmed,[128] indicating that the district court was not precluded from searching for an effective state response.[129] Yet, the subsequent

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126. 471 F. Supp. 516, 519 (N.D. Ill. 1978), *aff'd mem. sub nom.* Quern v. Hernandez, 440 U.S. 951 (1979).

127. *Id.* at 520.

128. 440 U.S. 951 (1979) (mem.).

129. *Id.* A thoughtful analysis of ambiguity in state law may be found in Judge Wellford's concurring opinion in the pre-*Pennzoil* case of Traughber v. Beauchane, 760 F.2d 673 (6th Cir. 1985). The federal plaintiffs brought a § 1983 case after their property was twice seized in a Tennessee prejudgment attachment. Alleging that the attachment contravened fourteenth amendment rights and prevented them from continuing their real estate business or obtaining loans, the Traughbers sought declaratory and injunctive relief. *Id.* at 675. The Sixth Circuit held that neither *Younger* nor *Pullman* precluded exercise of district court jurisdiction, because the plaintiffs merely sought protection against a private party's unconstitutional use of state law, and because the state courts had already deferred to the federal judiciary to determine the constitutionality of the attachment. *Id.* at 681-82.

The concurrence noted that plaintiffs had no state appeal as of right to challenge the summary attachment because the state judge had refused to certify his decision upholding this attachment as a final order, or to allow an interlocutory appeal. *Id.* at 684 (Wellford, J., concurring). Appellate review after a final decision in the underlying tort case would be too late to prevent irreparable harm. An extraordinary appeal under the Tennessee Rules of Appellate Procedure was "inadequate due to its discretionary nature. . . . There is an uncertain and speculative state remedy, and despite diligent efforts by plaintiffs, no state forum has been afforded them within a reasonable time . . . ." *Id.* at 686 (Wellford, J., concurring) (citations omitted). The opinion seems to balance the "serious" challenge and persistent efforts of plaintiffs against the distinct possibility that their livelihood would be lost before any state court hearing on their federal claims.

See also the pre-*Pennzoil* decision in Lessard v. Schmidt, 413 F. Supp. 1318 (E.D. Wis. 1976), concluding that there were practical problems with raising constitutional challenges and having them decided in a Wisconsin civil commitment proceeding. Statutes were "presumed constitutional unless proved otherwise beyond a reasonable doubt," and the right to appeal from a determination of insanity was doubtful. *Id.* at 1320. *Cf.* McKinstry v. Genesee County Circuit Judges, 669 F. Supp. 801 (E.D. Mich. 1987), where an indigent father in a child support case was imprisoned after being found in civil contempt. The state defendant sought federal court redress, alleging that the state judge had failed to inform him of his constitutional right to a court-appointed attorney. *Id.* at 803. In a decision sprinkled with paragraphs written entirely in capital letters, the court held that it could not abstain because Michigan judges were insistent on following state rather than United States Supreme Court precedent on the constitutional issue. *Id.* at 810.

It should be noted that federal plaintiffs cannot avail themselves of inadequate forum arguments if they have previously failed to invoke readily available rescue procedures. *See, e.g.*, Donkor v. City of New York Human Resources Admin., 673 F. Supp.

Pennzoil opinion has miniaturized the adequacy requirement by substituting presumptions about state law for realistic scrutiny.

C. Deakins v. Monaghan: *A Methodology For Handling Restrictive or Ambiguous State Provisions*

Limitations on the nonintervention doctrine, introduced in an intriguing post-*Pennzoil* decision, suggest a methodology for treating unreceptive state provisions that may not accord timely consideration of section 1983 issues. In *Deakins v. Monaghan*,[130] the Supreme Court addressed the question of what action federal judges should take if a section 1983 litigant could obtain only partial relief in pending state proceedings.

Owners of a construction business had instituted a federal suit against New Jersey officials, seeking injunctive relief and damages resulting from an allegedly unconstitutional search of their business and seizure of documents.[131] At the time the district court complaint was filed, a state grand jury investigation of the plaintiffs was ongoing.[132] As the case travelled through the federal courts,[133] plaintiffs were indicted in New Jersey, and decided to pursue their request for an injunction in the pending state action rather than in the section 1983 suit.[134] However, they represented to the Supreme Court that if the complaint were remanded to the federal district court, they would seek a stay of section 1983 monetary claims until the completion of the state proceedings.[135]

1221, 1226-27 (S.D.N.Y. 1987). *But see also supra* note 68, distinguishing between coercive and remedial state provisions.

130. 484 U.S. 193 (1988).

131. Monaghan v. Deakins, 798 F.2d 632, 633 (3d Cir. 1986). The complaint alleged that defendant officials had sought plaintiffs' aid in connection with an ongoing investigation of government corruption, and had "threatened to focus their investigation on Monaghan and his businesses if he did not cooperate." *Id.* at 634. Monaghan replied that he had been advised not to answer questions without his attorney present. Monaghan's partner also was allegedly threatened. Subsequently, defendants occupied plaintiffs' business premises for eight hours, compelled every person who happened to be present to produce identification, and seized privileged documents. *Id.*

132. *Id.* at 634. The federal plaintiffs had not yet been indicted, but defendants' motion for dismissal of the federal complaint on the basis of the pending state grand jury proceeding was granted by the district court. *Id.* at 635. Plaintiffs' motion for a preliminary injunction mandating the return of the seized documents was denied. *Id.*

133. On appeal, the Third Circuit unanimously reversed the dismissal of plaintiffs' monetary claims, holding that these claims could not be determined in the state grand jury investigation. *Id.* at 635; *id.* at 639 (Adams, J., concurring in part and dissenting in part). The majority of the panel also ruled that this ongoing grand jury investigation could not be characterized as a pending proceeding for *Younger* purposes. *Id.* at 637.

134. *Deakins*, 484 U.S. at 198-99.

135. *Id.* at 199.

The Supreme Court noted that because the request for equitable relief had become moot,[136] the remaining issue was whether the damages claim should be stayed rather than dismissed.[137] The Justices concluded that the federal courts had "no discretion to dismiss claims for monetary relief that cannot be redressed in the state proceeding."[138]

Yet no immediate federal adjudication on the merits was permitted. Justice Blackmun's opinion for the Court approved a wait-and-see stay so that the state prosecution could continue without federal intervention.[139] As more fully explained in Justice White's concurring opinion, immediate federal action would be harmful in that any ruling on damages could determine the factual and legal questions at stake in the state prosecution and have a res judicata effect there.[140] The concurrence suggested that this intrusion on state proceedings could be at least as disruptive as the issuance of a declaration without an accompanying monetary award.[141]

On the other hand, outright dismissal would also be unwarranted because damages "may not be obtained in any *pending* state proceeding."[142] And even if the state court were to agree that a constitutional violation had occurred, the statute of limitations might have run by that time and the prior dismissal would foreclose return to the federal court on the monetary issue.[143]

It is significant that none of the Justices viewed the possibility of an independent state court suit for damages as an adequate remedy. The Court noted that "[b]ecause the state criminal proceeding can provide only equitable relief, any action for damages would necessarily be separate," and would require initiation of a new state

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136. *Id.*

137. *Id.* at 195.

138. *Id.* at 202 (footnote omitted). The Court indicated that dismissal of the damages claim would have been improper even if *Younger* were found to apply to pending grand jury investigations.

139. *Id.* at 202-03.

140. *Id.* at 208 (White, J., concurring). The federal judgment on damages might determine that evidence was seized in violation of the fourth amendment, that sixth amendment rights were violated during the interrogation, or that fifth amendment rights were somehow violated.

141. *Id.* at 209 (White, J., concurring). Under Samuels v. Mackell, 401 U.S. 66 (1971), *Younger*'s companion case, the federal district court would generally have no discretion to issue a declaration as to evidence being used in an ongoing state prosecution. *Id.* at 73. *See supra* note 61. It would therefore be anomalous to permit such a declaration if a damages claim were added to it.

142. 484 U.S. at 206 (White, J., concurring) (emphasis added).

143. *Id.* at 203 n.7; *id.* at 206 (White, J., concurring).

action.[144] The federal plaintiffs were expected to pursue these initiatives,[145] yet the district court was instructed to wait in the wings and pass judgment later on whether the constitutional claims received appropriate consideration in the state forum.[146] Justice Blackmun declined to call this retention of jurisdiction "hovering," as suggested by the state, and expressed confidence that the district court would "hold up its end of the comity bargain . . . ."[147]

At first glance, the *Deakins* holding might appear unremarkable. The scope of the pending prosecution was too narrow to provide the relief requested by the federal plaintiffs, and the wait-and-see approach approved by Justice Blackmun effected a reasonable balance between federal and state interests.

Closer analysis, however, reveals that *Deakins* has more complex ramifications. Note that an adequate state forum on the monetary claims was not assumed, although defendant officials had extended an "invitation" to utilize that forum.[148] Without any indication that state law "plainly barred" the claims, the Supreme Court nonetheless insured further federal scrutiny of the state damages remedy.

One hypothesis might relate this deviation from the letter of *Pennzoil* solely to respondents' request for damages instead of equity. Under this theory, the "plainly bars" rubric comes into play only if an injunction or declaration is sought; monetary redress is so different that new rules of federalism involving heightened scrutiny of ambiguous state law must be invented. The district court should wait and see if the state forum is adequate, even when state officials aver that money damages are available.

Neither the majority nor the concurring opinion in *Deakins* supports the thesis that a distinction between types of remedies is impelled by consideration of federalism. Justice Blackmun disclaimed any intention of deciding the "awkwardly presented" issue of

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144. *Id.* at 204.

145. The Justices did not discuss the possibility that plaintiffs could seek district court adjudication as soon as the state prosecution had terminated.

146. 484 U.S. at 202. One district court has hinted that state courts need only hear, not listen: "applicability of the *Younger* doctrine depends on the federal plaintiffs having the opportunity to present their constitutional claims to the state courts and not on the degree to which a state trial court deliberates regarding those claims . . . ." Cook v. Franklin County Mun. Court, 596 F. Supp. 490, 504 (S.D. Ohio 1983).

147. 484 U.S. at 203. *See also* Allen v. Louisiana State Bd. of Dentistry, 835 F.2d 100 (5th Cir. 1988), where plaintiffs sought both monetary and equitable relief. The circuit court applied a stay approach, invoking Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). 835 F.2d at 104. *See supra* note 74 for a discussion of *Colorado River*.

148. 484 U.S. at 204.

whether *Younger* applies to monetary requests,[149] and instead focused on pendency. Justice White pointed out that district court discussion of damages would probably contain declaratory statements about the law or facts involved in the pending state action that would be highly intrusive.[150] The concurrence concluded that *Younger* should ordinarily bar such offenses to comity for the same reasons that militate against enjoining a pending prosecution.[151]

Thus, the inability of the federal plaintiff to obtain a particular remedy in a pending state proceeding is the critical factor in *Deakins*, not the nature of that remedy.[152] The Supreme Court has narrowly circumscribed injunctive and declaratory relief where a state action is pending,[153] while permitting a declaration under far more permissive standards in the absence of an ongoing state prosecution.[154] When the federal suit is the only one that has been filed,[155] there is no duplication of judicial resources and no slur on the state's ability to adjudicate constitutional questions.[156]

If pendency is the key to *Deakins*, then the case adds a vital new element to adequacy jurisprudence. When the state proceeding is not coterminous with the federal suit, the district court must retain jurisdiction even though plaintiff could initiate a new state action to obtain the redress he seeks. Arguably meritorious section 1983 claims cannot be dismissed if the relief requested—whatever that relief may be—is broader than the ongoing state action could accord.[157]

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149. *Id.* at 202 n.6.

150. *Id.* at 208 (White, J., concurring).

151. *Id.* at 208-09 (White, J., concurring).

152. *See id.* at 202 (circuit rule requiring lower court to stay rather than dismiss "claims that are not cognizable in the parallel state proceeding," was "sound").

153. *See supra* discussion at section II(A)(1).

154. *See supra* note 72.

155. *But see* Hicks v. Miranda, 422 U.S. 332, 349 (1975), discussed *supra* note 72 (holding that swift institution of a state proceeding before matters of "substance" have occurred in federal court brings *Younger* comity principles into play).

156. These comity rationales are discussed more extensively *infra* at subpart IV(C).

157. Justice Powell's *Pennzoil* opinion did not wrestle with this aspect of pendency because he concluded that the company could have asserted its bond and lien arguments in the original Texas trial court, or perhaps on appeal from that trial court's judgment. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 16-17 nn.15-16 (1987). An earlier decision, Moore v. Sims, 442 U.S. 415, 425 n.9 (1979), stressed that a counterclaim in a pending state civil action could encompass plaintiff's federal questions. *See supra* note 109.

The Third Circuit, treating claims that could not all be heard in a pending state proceeding, has used a bifurcation approach. *See* Williams v. Red Bank Bd. of Educ., 662 F.2d 1008 (3d Cir. 1981). In *Williams*, a pre-*Deakins* decision, a teacher alleging constitutional violations by a school board sought an injunction against its prosecution of tenure-related charges against her. She also sought damages, and attorney's fees. *Id.*

This approach would have far-reaching implications in section 1983 cases where equitable, interlocutory relief is needed, for example because enforcement of an unconstitutional state penal statute precipitates business losses for the defendant that might not be compensable even if the statute is struck down at the prosecution's finale.[158] District court judges who read *Deakins* as a refinement of *Pennzoil's* general rubric may be less reluctant to grant interim relief that is currently unavailable in a pending proceeding.[159]

Deakins also can be read to support closer scrutiny and retention of federal jurisdiction where it appears that state consideration of section 1983 issues will be inordinately delayed. Such delays are more likely to occur in civil proceedings than in criminal prosecutions.[160] In some instances, interim relief may not be immediately warranted. Yet, ambiguous procedures governing the state suit may make it difficult to determine whether federal claims will be heard before irreparable damage occurs. A wait-and-see methodology is particularly appropriate under such circumstances for the very reasons cited in *Deakins*. It avoids immediate and premature intervention while respecting the "virtually unflagging" obligation of the federal judiciary to adjudicate constitutional questions.[161]

III. STANDARDLESS SCRUTINY: CONSTITUTIONAL TORTS PREDICATED ON SECTION 1983 PROCEDURAL DUE PROCESS CLAIMS

In the area of constitutional torts, federal plaintiffs are not asking for equitable relief against pending state proceedings; instead, they generally seek damage awards that may be limited or unavailable in state tribunals. Federal judges reviewing tort claims are therefore freed of the constraints traditionally imposed on dispensing equity as they look to section 1983 for direction.

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at 1011. Only dismissal of charges and back pay could be awarded in the state proceeding, and therefore jurisdiction could be retained as to the damage remedy. *Id.* at 1023.

158. An injunction could be tailored to allow the plaintiff to continue in business without interfering with the conduct of the prosecution. For a persuasive discussion of the inadequacy of criminal prosecutions where a federal plaintiff demonstrates the need for interim and prospective aid, see generally Laycock, *supra* note 6. Professor Laycock also argues that relief should be permitted on the basis of a class composed of a named plaintiff who is the object of a state prosecution and other class members who have not yet been prosecuted. *Id.* at 220.

159. *See supra* note 59.

160. *See supra* note 6.

161. Deakins v. Monaghan, 484 U.S. 192, 202-03 (1988) (citing with approval Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817 (1976), discussed *supra* note 74).

The remedies provided by section 1983 are described in broad categories—"an action at law . . . or other proper proceeding for redress."[162] *Monroe v. Pape*[163] answered in the fourth amendment context the question of whether such relief should be withheld if plaintiff's injury could be compensated by the state in which it occurred. The Supreme Court's holding was sweeping and unequivocal: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[164]

A diametrically opposite view dominates in cases where a district court judge must decide whether a common law tort has risen to the level of a deprivation without due process of law. The availability of an adequate state forum in such instances may extinguish what might be termed a nascent constitutional violation. In a series of opinions involving procedural due process, the Supreme Court has disposed of a substantive question—the existence of a constitutional right—by using jurisdictional doctrine.[165]

The federalism dilemma posed by common law torts is an obvious one. These torts frequently result in injury to liberty or property. If the offender acted under color of state law, the controversy would arguably qualify for federal judicial consideration under section 1983.[166] By deporting the underlying cause of action, the district court achieves two familiar aims: it decreases its workload and avoids intervention in state functions.

The ranks of section 1983 suitors could have been thinned by a de minimis rule requiring quantification of the loss where possible and precluding cases falling below the line. The undisputed facts in

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162. 42 U.S.C. § 1983 (1988).

163. 365 U.S. 167 (1961). The complaint alleged that petitioners' home had been invaded by 13 police officers who forced petitioners to stand naked while every room was ransacked. These officers had no search or arrest warrants. After the search, Mr. Monroe was taken to the police station and detained on "open" charges for 10 hours. He was not permitted to call his attorney or his family, and he was released without criminal charges being lodged against him. *Id.* at 169.

164. *Id.* at 183.

165. *See* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Parratt v. Taylor, 451 U.S. 527 (1981). *See also infra* subpart III(A).

166. It should be noted, however, that the Supreme Court has classified certain types of harm that appear to implicate liberty or property as nonconstitutional. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976), which held that a person whose photograph is circulated by the police as an "active shoplifter," *id.* at 695, may suffer an injury to his reputation, but that this injury is not cognizable under the fourteenth amendment. *Id.* at 712.

Parratt v. Taylor[167] would have facilitated the formulation of a triviality barrier to jurisdiction. Taylor, a prisoner, used his inmate account to purchase hobby materials (valued at $23.50), which were somehow misplaced after they arrived at the prison complex.[168] He brought suit pursuant to section 1983 seeking recovery of this loss.

Justice Rehnquist's opinion for the Court, however, regarded a de minimis approach as foreclosed by the failure of Congress to establish any monetary cut-off under the statute that provides a jurisdictional basis for section 1983 cases.[169] Instead, *Parratt* found that the hobby kit was property, that the loss resulting from negligence constituted a deprivation, and that Nebraska prison officials had acted under color of law in causing this deprivation.[170]

Nonetheless, the loss was not incurred "without due process of law."[171] The Court reached that conclusion by examining the adequacy of Nebraska's tort remedies in light of procedural due process demands.[172] This examination neither incorporated a hard-line "clearly bars" rubric nor adopted the realistic scrutiny of *Hathorn*. Indeed, the Justices created no standard to inform district courts as to how carefully they should look for a meaningful state remedy or how to measure the adequacy of state compensation.[173]

With respect to constitutional torts, two kinds of inadequacy could be relevant. First, the state may be unwilling to consider the claim or may delay inordinately any possible relief.[174] Second, the potential recovery available under state provisions may be nominal or substantially less than could be awarded under federal law.

For a number of doctrinal and practical reasons, the Justices have not routinely required that state and federal compensation

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167. 451 U.S. 527 (1981).

168. *Id.* at 530. At the time that Taylor's packages arrived, he was in isolation and was not permitted to have the hobby materials. Normal prison procedures called for an inmate to be notified of a package's arrival. At that point, he would either pick up the package or have it delivered, signing a receipt in either instance. However, because of Taylor's segregation, his hobby kit was signed for by two prison employees, one civilian and one inmate. Upon his release from segregation, Taylor inquired into the whereabouts of his packages but they were never found. *Id.*

169. *Id.* at 529; *see* 28 U.S.C. § 1343 (1988).

170. 451 U.S. at 536-37.

171. *Id.* at 543.

172. *Id.*

173. The Court's sidestepping is unfortunate given their explicit purpose in *Parratt* of "once more put[ting] our shoulder to the wheel hoping to be of greater assistance to courts confronting such a fact situation than it appears we have been in the past." *Id.* at 533-34.

174. *See infra* notes 254-60 and accompanying text.

levels match.[175] However, their careless treatment of the gap between federal and state redress has failed to identify any class of cases in which federal interests diverge significantly from common-law concerns. In such cases, state relief should not be deemed adequate unless it bears a substantial similarity to the redress available under section 1983.[176] The lack of Supreme Court guidance has resulted in conflicting assumptions and rulings by lower courts left without a coherent standard for adequacy measurements.[177]

A. Adequate State Remedies Under Parratt *and its Descendants*

Although defendants in *Parratt* had no intention of inflicting any deprivation upon plaintiff, the majority nonetheless held that the loss of the hobby kit gave rise to deprivation of a property right protected by the Constitution.[178] The relief given by this holding was to some extent whisked away again by the Court's conclusion that random and unauthorized acts cannot be prevented by states in advance, but can be expiated by an appropriate post-deprivation hearing.[179] Note the source of the governmental wrong under this analysis. Because the misconduct did not emanate from official policy,[180] the state errs only if and when it denies subsequent remedial

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175. *See infra* notes 184-86 and accompanying text.

176. *See infra* section III(B)(2).

177. *See infra* subpart III(C).

178. 451 U.S. 527, 536-37 (1981).

179. *Id.* at 543-44. *Parratt* has been compared to cases arising under the fifth amendment's requirement of just compensation for taking of private property by the government. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), which held that "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " *Id.* at 195 (quoting *Parratt's* successor Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984)). Such failure to provide redress was recognized as unconstitutional as to regulatory takings in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (church was denied the right to put recreational structures on its floodplain property). *First English* and Nollan v. California Coastal Commission, 483 U.S. 825 (1987), in which an invalid exaction was imposed on an owner's application to enlarge a beach bungalow, both held that the right to a just compensation remedy for the property owner accrued immediately on the enactment of the offending regulation. 482 U.S. at 306-07; 483 U.S. at 839.

180. An injury inflicted by a government employee whose acts represent official policy may give rise to municipal liability under Monell v. New York City Department of Social Services, 436 U.S. 658, 690 (1978). Indeed, § 1983 suits may be predicated on an informal governmental custom. *Id.* at 690-91. Thus, a high executive official may be characterized as a policy-maker whose unconstitutional decision could be an adequate basis for imposing governmental liability. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (county prosecutor made a considered decision based on his understanding of the law which caused petitioner's fourth amendment rights to be violated; § 1983 liability was thus chargeable to the county); Kibbe v. City of Springfield, 777 F.2d 801

process. Thus, the fourteenth amendment would not become " 'a font of tort law to be superimposed upon whatever systems may already be administered by the states.' "[181]

Such an approach could be defensible in cases where these "systems" offered both plenary consideration and meaningful compensation for the violation. However, no standard was provided for measuring the adequacy of state redress. The Court merely guarded the federal portals by indicating that state remedies may be sufficient even if they do not give "all the relief . . . available . . . under § 1983."[182] Nebraska tort claims procedure did not permit suit against individual employees, punitive damages, or a jury trial.[183] These preclusions could have affected the outcome of a suit (by changing the defendant and fact-finder) as well as the amount of the recovery. Nonetheless, the potential for obtaining the full value of lost property remained.

This potential was deemed insignificant in subsequent decisions. *Hudson v. Palmer*[184] expanded the crucial conclusion that state redress and section 1983 relief need not be coterminous. In *Hudson*, a Virginia prisoner alleged that a guard had intentionally and unnecessarily destroyed personal property, including legal papers, during a search of his cell.[185] The majority held that the prisoner's inability to obtain "the full amount . . . he might receive in a § 1983

(1st Cir. 1985) (jury finding of municipal liability was supported by facts showing the city was grossly negligent in failing to train its officers). *But cf.* Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (proof of a single incident of unconstitutional activity is not sufficient to impose liability unless the facts show injury was caused by an existing unconstitutional municipal policy attributable to a municipal policy maker).

See generally Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 41-67 (1980) (marshalling arguments that damage awards against individual employees in tort cases are generally less appropriate and less effective as deterrents than equitable relief or assessment of damages against governmental entities).

181. *Parratt*, 451 U.S. at 544 (quoting with approval from Paul v. Davis, 424 U.S. 693, 701 (1976)).

182. *Id.* at 544. Justice Marshall's dissent raises the question of whether a plaintiff who had exhausted prison grievance procedures would know about the state tort claims provisions, and whether prison officials had a duty to inform him of the remedies. *Id.* at 555-56 (Marshall, J., dissenting).

183. *Id.* at 543-44. Ironically, these same preclusions are present in the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 2402, 2412, 2671-80 (1988), and were characterized as inadequacies in Carlson v. Green, 446 U.S. 14, 20-23 (1980). *Carlson* ruled that the plaintiff could bring a private cause of action directly under the eighth amendment against prison officials who allegedly failed to provide medical attention to a prisoner, plaintiff's deceased son. *Id.* at 23. The fact that the federal statute precluded punitive damages and jury trials made it a "much less effective" tool than other existing remedies. *Id.* at 22.

184. 468 U.S. 517 (1984).

185. *Id.* at 535.

action" through state remedies did not mean that these remedies were inadequate.[186] The opinion did not attempt to scrutinize state law with precision, nor did it give guidance as to the permissible size or nature of such a gap.

Two years later the Supreme Court sharply constricted federal intake of constitutional torts and satisfied internal critics[187] by rescinding the possibility that a plaintiff complaining only of negligence by a state officer could establish a due process claim for relief. *Daniels v. Williams*,[188] like its progenitors, involved a state prisoner. Plaintiff unsuccessfully invoked a liberty interest[189] after injuring his back because of a pillow negligently left on a stairwell by a prison deputy.[190] A companion case arising from more troubling facts, *Da-*

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186. *Id.* at 535. Settling a point which had divided the lower courts, the Supreme Court unanimously held that intentional deprivations of property were subject to the *Parratt* jurisdictional limitations. The state cannot control in advance the intentional acts of its employees where such acts are random and unauthorized, but postdeprivation procedures could satisfy due process demands. *Id.* at 533.

187. In his *Parratt* concurrence, Justice Powell had suggested that the majority was naively ignoring the prospect of a flood of trivial § 1983 litigations resulting from its decision. He predicted that "despite the breadth of state tort remedies, . . . claims [for negligent invasions of liberty or property] will be more numerous than might at first be supposed." 451 U.S. at 550-51 (Powell, J., concurring). The concurrence cited as an example the pre-*Parratt* case of Kent v. Prasse, 385 F.2d 406 (3d Cir. 1967) (per curiam), where a state prisoner forced to work on a defective machine sustained an injury which was not compensable under state law. 451 U.S. at 551. The prisoner's federal suit against prison officials was dismissed because, among other reasons, there was no intentional violation nor any failure to enforce state law. 385 F.2d at 407. *Parratt* appears to reject this approach and would therefore have permitted such a federal suit. *But cf.* Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 535-37 (1989) (suggesting that negligent deprivations without due process may be more abusive than intentional violations without due process).

188. 474 U.S. 327 (1986).

189. The United States Supreme Court has held that *Parratt* applies to liberty infringement claims if such deprivations cannot be anticipated and must therefore be expiated by proper postdeprivation process. Zinermon v. Burch, 110 S. Ct. 975, 990 (1990). The court stressed:

> It is true that *Parratt* and *Hudson* concerned deprivations of property. It is also true that Burch's interest in avoiding six months' confinement is of an order different from inmate Parratt's interest in mail-order materials valued at $23.50. But the reasoning of *Parratt* and *Hudson* emphasizes the State's inability to provide predeprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake.

Id. at 987.

190. 474 U.S. at 328. *Daniels* overruled *Parratt*'s prior conclusion that "mere lack of care" could constitute a due process violation. *Id.* at 330-31. The majority reserved for future cases the issue of whether grossly negligent or reckless conduct could form the basis for a *Parratt* claim. *Id.* at 334 n.3. However, the court reaffirmed that § 1983 required no state-of-mind proof, only a showing of a constitutional violation. The nature of the constitutional right asserted determines whether negligent conduct provides

vidson v. Cannon,[191] held that no deprivation of liberty under section 1983 had occurred where prison officials failed to protect an inmate from assault by another inmate, despite prior warning of such an attack.[192]

In a surprising concurrence in both cases, Justice Stevens concluded that the results reached by the majority were correct because state remedies were in fact adequate.[193] Yet an examination of the applicable state law in *Davidson* indicates that the federal plaintiff had a right to sue but no chance of obtaining relief regardless of the merits of his claims.[194] A New Jersey statute prohibited recovery from the state and its employees for harm inflicted on a prisoner by other inmates.[195] This did not mean, according to Justice Stevens, that the section 1983 action should proceed. The availability of particular defenses could not invalidate the state's post-injury processes: statute of limitations objections can dispose of tort litigation, and by analogy, provision of an immunity defense in *Davidson* could defeat recovery without rendering the state's post-deprivation procedure constitutionally defective.[196]

This conclusion begs the question that *Parratt* created. If a property or liberty interest exists and can be divested only by an adequate corrective response, there appears to be an underlying presumption that state redress must be available in the general class

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a sufficient basis for the claim. *Id.* at 330. A negligence claim cannot rise to the level of a constitutional right under the due process clause. *Id.* at 335-36. Yet scienter is not altogether irrelevant to § 1983 suits. *See supra* note 180 (discussion of municipal liability).

191. 474 U.S. 344 (1986).

192. *Id.* at 347-48. Justice Blackmun's dissent in *Davidson* suggested that defendant had been reckless and that, if necessary, a remand could provide further evidentiary confirmation. *Id.* at 356-57 (Blackmun, J., dissenting). He noted also that because "deliberate indifference," as demonstrated by a prison officer's denial of medical aid to an inmate, could violate the eighth amendment, *see* Estelle v. Gamble, 429 U.S. 97, 104 (1976), no higher requirement should be imposed on plaintiffs proffering a claim of a liberty infringement under the due process clause. 474 U.S. at 357. Justice Brennan's *Davidson* dissent similarly concluded that proof of recklessness should be enough to meet the procedural due process standard. *Id.* at 349 (Brennan, J., dissenting).

193. As to *Daniels*, the Fourth Circuit had determined that plaintiff had a remedy for the alleged negligence under Virginia law. Justice Stevens' concurrence deferred to this finding, despite Daniel's "vigorous" argument that sovereign immunity would have defeated his claim in the state courts. 474 U.S. at 341 (Stevens J., concurring).

194. 474 U.S. at 358-59 (Blackmun, J., dissenting).

195. *Id.* at 358. *See* N.J. STAT. ANN. § 59:5-2(b)(4) (West 1982).

196. *Id.* at 342 (Stevens, J., concurring). The concurrence also attempted an analogy to contributory negligence defenses—a clearly distinguishable context, because it presumes that plaintiff is at fault in incurring the injury. *Id.* Davidson's claim was that he was a helpless assault victim. *Id.* at 346.

of cases that includes the federal plaintiff's claim. A particular litigant's failure to follow a valid procedural rule (such as a statute-of-limitations provision) might defeat his claim. Nonetheless, it would not automatically defeat the whole class.[197] Under the state law applicable in *Davidson*, all prisoners assaulted by other inmates would be blocked from recovery even if guards looked on without intervening.[198]

Posit a section 1983 plaintiff with an impressive bouquet of virtues. He has been deliberately deprived of a large amount of property by state officers, and to find redress he would faithfully follow every procedural requirement that the state prescribes. Can the federal judiciary dismiss the case because he has a purely abstract right to file suit in state court, even though state law already precludes any possible recovery? If so, *Monroe v. Pape* becomes an ironic counterpoint.[199] There, as previously noted, the Supreme Court held that because federal redress is specifically intended to be supplementary to the state remedy, plaintiff could invoke the Civil Rights Act without seeking a state forum.[200] In *Monroe*, the state had outlawed unreasonable searches and seizures, but the majority found that this fact was irrelevant to plaintiff's choice-of-forum rights.[201]

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197. *See infra* subpart III(B) for further analysis of the extent to which *Parratt* claims should be defeated by state remedies which allow suit but not recovery.

198. *But see* Justice Rehnquist's majority opinion in *Davidson*, which concludes that such a fact pattern could form the basis for a procedural due process claim, without addressing the effective-remedy issue. 474 U.S. at 348.

One could define the class as all persons instead of all prisoners, and argue that the nonintervening guard, for example, could be sued if inmates attacked a teacher working in the prison system. The gravamen of Davidson's suit, however, was that he was caged by legal compulsion and therefore unable to defend himself. Thus, the similarly situated persons would be prisoners rather than those merely employed on the premises. *See id.* at 350 (Blackmun, J., dissenting) (noting that while Daniels might have avoided slipping on the stairs, Davidson had no recourse except help from the guards).

The facts concerning a federal plaintiff's claim may be critical to assessing the significance of an immunity bar. In Martinez v. California, 444 U.S. 277 (1980), the remoteness of the deprivation from the official negligence prevented the harm from being state action. *Id.* at 285. Hence, the federal claim was disposed of without regard to the immunity statute.

199. *See supra* notes 163-64 and accompanying text.

200. 365 U.S. 167, 183 (1961). Indeed, even the state's provision of a remedy coterminous with or greater than the relief available under § 1983, would not affect plaintiff's procedural right to pursue a federal suit. Whitman, *supra* note 180, at 22-25.

Justice Rehnquist, in a dissent from certiorari joined by former Chief Justice Burger and Justice Blackmun, criticized *Monroe*'s "supplementary remedy," holding and urged its reconsideration. City of Columbus v. Leonard, 443 U.S. 905, 910-11 (1979) (Rehnquist, J., dissenting).

201. *Accord* Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 287-96 (1913) (estab-

Is it critical that *Monroe*, a fourth amendment case, involved a more specific constitutional claim than due process? Most of the Justices have expressed the view that *Parratt* is applicable only to procedural due process violations.[202] The conclusion that *Parratt* should not hobble the federal courts in other contexts does not dispose of *Monroe*'s relevance to procedural due process cases like *Davidson*, where the federal plaintiff's path in state court is already automatically blocked.[203] It would be anomalous to leave such a plaintiff with no recourse in any court, given *Monroe*'s instruction that section 1983 is an additional option to state remedies.

Adoption of this anomaly would also deepen the analytical confusion created by *Parratt*'s use of constitutional concepts to accomplish workload redistribution. If the state's offering of paper redress is the sole basis for the redistribution, the nature of the property and liberty deprivation becomes irrelevant. Claims against immunized officials would be permanently extinguished whether the deprivation was trivial (guard deliberately takes inmate's sunglasses) or serious (guard intentionally destroys inmate's valuable legal papers).[204]

The Court should have escaped this logical conundrum by

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lishing that Congress may enforce fourteenth amendment substantive due process guarantees against state officials whether their acts are authorized or unauthorized). By contrast, *Parratt*'s descendants have found the authorization factor to be critical. *Parratt* limitations do not apply where conduct is the result of established state procedure rather than random and unauthorized action. In such instances, no postdeprivation remedy can satisfy procedural due process. Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (cited in Hudson v. Palmer, 468 U.S. 513, 532 (1984)). In *Logan*, the Illinois Fair Employment Practices Commission (the Commission) failed to hold a fact-finding conference within 120 days of the filing of a complaint alleging employment discrimination. Because the statute governing Commission procedure made such a hearing within the time period mandatory, the complaint was dismissed for lack of jurisdiction. *Logan* concluded that although the failure to schedule the conference may have been inadvertent, the state "system" destroys property interests whenever the Commission does not commence a timely fact-finding conference. 455 U.S. at 436.

202. *See infra* note 231 and accompanying text, discussing *Parratt*'s relation to substantive due process cases. As to Bill of Rights claims, a federal forum has been accorded. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985), where the Supreme Court held that the fourth amendment could apply to a police officer's shooting of an unarmed fleeing suspect, without considering whether state postdeprivation remedies would have been adequate. *See also infra* notes 208, 230, discussing the Supreme Court's treatment of "fundamental" rights.

203. *See supra* notes 197-98 and accompanying text, discussing the broad immunity statute that bars relief to a whole class of plaintiffs regardless of their diligence or the merits of their procedural due process claims.

204. For further discussion of *Parratt*'s application to intentional destruction of legal documents, see *infra* note 208 and accompanying text. *See also* a discussion of liberty and property deprivations involving institutionalized persons *infra* at subpart III(B).

framing its analysis as substantive rather than procedural due process. Substantive violations arise, among other occasions, when the state imposes irrational or arbitrary restraints on a citizen's liberty or property rights.[205] Procedural due process, as illustrated by the very precedents *Parratt* cited,[206] generally concerns a valid state purpose coupled with the precaution of a hearing to insure that this goal was properly promoted in the plaintiff's case. *Parratt* and *Hudson*, by contrast, involved property deprivation that would always be classified as misconduct.[207]

The substantive route has the advantage of flexibility. It would permit the Court to rule that the confiscation of sunglasses is not unreasonable and arbitrary enough to rise to the level of a constitutional deprivation. *Parratt* and its descendants have instead chosen the less adaptable procedural approach. *Hudson* lumps the significant and the trivial loss groups together,[208] relegated to whatever level of state relief the Court sanctions. If the mere right to file in a

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205. *See, e.g.*, Monaghan, *State Law Wrongs, State Law Remedies and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 985-86 (1986). Professor Monaghan suggests that *Parratt* must have been predicated, at least in part, on substantive due process concerns. If Parratt's claim had been based only on procedural grounds, the Court would have affirmed rather than reversed the judgment below. *See also* Redish, *supra* note 4, at 100-01 (providing examples of illegal behavior that cannot be "purified" by use of proper procedures).

206. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977). The Court, in deciding the procedural issue of whether certain safeguards should be mandated to reduce the possibility of unwarranted corporal punishment, presumed that school authorities had a right to paddle students in order to maintain school discipline. *Id.* at 662-63.

207. The gravamen of these decisions is that the deprivations were unauthorized, and therefore could not be anticipated or prevented in advance.

208. *See* Hudson v. Palmer, 468 U.S. 517, 535 (1984). Justice Stevens' dissenting opinion also noted that Palmer's complaint alleged intentional destruction of legal papers. *Id.* at 541 & n.3 (Stevens, J., dissenting). *See also* Hossman v. Spradlin, 812 F.2d 1019, 1022-23 (7th Cir. 1987), where the circuit court held, citing *Hudson*, that a prisoner who alleged that prison officials had intentionally destroyed legal papers and law books had not been deprived of due process because the state provided an adequate remedy. After acknowledging that cases such as Bounds v. Smith, 430 U.S. 817 (1977), enunciated a "fundamental" constitutional right of access to the courts, *Hossman* held that "[t]he mere assertion by appellant, in both his response to defendants' motion for summary judgment and in his brief, that legal papers, transcripts, and law books were intentionally kept from him fails, without more, to demonstrate a constitutionally significant deprivation of meaningful access to the courts." 812 F.2d at 1021-22 (footnote omitted). To suggest that a pro se prisoner whose legal materials have been taken away has the burden of proving that these documents were "essential to a pending or contemplated appeal" is, to say the least, disingenuous.

In Byrd v. Stewart, 803 F.2d 1168 (11th Cir. 1986), legal papers and other property were seized in an unlawful search of plaintiff's home before his arrest. The circuit court discussed the value of the property at stake, concluding that "the *Hudson* rationale applies equally whether the property is valued at $23.50 or $10,000.00." *Id.* at 1170. The

state tribunal is sufficient, as Justice Stevens urges, then a section 1983 litigant subjected to intentional and serious loss would encounter a further deprivation by ouster from both federal and state fora.

While the requirement of effective post-injury redress does not prevent the initial misconduct, a damage award could mitigate or vitiate the effect of that misconduct. Thus, official arbitrariness is not compounded. However, when federal courts profess to see a state remedy where there is none, they are signalling that no post-deprivation process is due.

B. Fleshing Out Post-Deprivation Process

At the outset of a section 1983 case, a district judge should determine whether automatic barriers or inordinate delay would greet a claim of deprivation that she deports to a state tribunal. Next, the adequacy of state compensation levels should be examined. The Supreme Court has provided no guidance on how to identify injuries that merit a higher recovery than a state provides, and whether such injuries should be measured against the compensation that would be available under section 1983.

1. Identification of Cases Presenting Distinct Federal Interests.—Historically, section 1983 has not developed in majestic isolation from state tort law. Civil rights litigation has been influenced both by constitutional vocabulary,[209] and by tort concepts.[210] This cross-fertilization process, however, has not led to congruence between federal and state relief for deprivations of liberty and property. As Justice Harlan's concurrence in *Monroe* noted, it would be "the

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fact that legal documents had been intentionally and unlawfully taken is noted but not discussed.

If access to the courts is a "fundamental" right, as the Supreme Court indicated in several decisions, *see, e.g.*, *Bounds*, 430 U.S. at 817, 821; Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969), then *Parratt* forum limitations should not apply, making the estimate of state remedies, therefore, irrelevant. *See infra* note 230 for further discussion of "fundamental" rights. *But see* Justice Powell's concurring opinion in *Bounds*, setting out his understanding that "where we extended the right of access [to the courts] . . . to civil rights actions . . . we did not suggest that the Constitution required such actions to be heard in federal court." 430 U.S. at 833 (Powell, J., concurring) (citations omitted). Some lower courts have held that destruction of legal papers effects a violation of the right to judicial access and that a federal forum should be available in such instances. *See, e.g.*, Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969).

209. *See, e.g.*, Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441 *passim* (1989).

210. *See, e.g.*, Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 13-25 (1974).

purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause . . . ."[211]

The Supreme Court has indicated that common law rules—and limitations—may be relevant to section 1983 cases if "the interests protected by . . . [tort law] parallel closely the interests protected by a particular constitutional right."[212] An example of such a parallel would be a suit on behalf of one accidentally injured by a state official speeding in a government vehicle.[213]

The more complex task is defining the circumstances under which federal interests outrank or diverge from state concerns. Major cases such as *Parratt* and *Daniels*, which highlighted only trivial property losses or slip-and-fall negligence, should not be allowed to obscure the more serious deprivations that can be swept up in the procedural due process rules that the Court has created. State failure to remedy deprivation of constitutional rights was a major concern underlying the enactment of section 1983: "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not . . . ."[214] This passage is uncomfortably reminiscent of the prison personnel who failed to protect Davidson, despite prior warning of the attack on him, and the state judges who were legislatively barred from granting Davidson any damages.[215]

The Supreme Court stated in *Davidson* that due process forbids " 'deprivation' of a protected interest," but does not require "due care," a torts standard.[216] Yet the majority opinion also indicated that a constitutional violation could occur where prison officials witnessed an assault and permitted it to proceed,[217] a conclusion that

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211. Monroe v. Pape, 365 U.S. 167, 196 n.5 (Harlan, J., concurring).

212. Carey v. Piphus, 435 U.S. 247, 258 (1978). The Court held that a student's emotional distress about being suspended from school without due process protections could be compensable by nominal damages under § 1983. *Id.* at 263-64. In this instance, however, no compensation was permitted for deprivation of school time because the student could have been barred even if proper procedures had been observed. *Id.* at 252.

213. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 698 (1976) (expressing a fear that constitutionalizing common law defamation could lead to giving constitutional status to car accidents), *reh'g denied*, 425 U.S. 985 (1976).

214. Cong. Globe, 42d Cong., 1st Sess. App. at 78 (Mar. 31, 1871).

215. *See* Davidson v. Cannon, 474 U.S. 344 (1986), discussed *supra* notes 191-95 and accompanying text.

216. 474 U.S. at 348. *Accord* Daniels v. Williams, 474 U.S. 327, 333-36 (1986); Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. at 700-01, 712 (holding that the constitution does not replicate the duty of care under common law).

217. *Davidson*, 474 U.S. at 348.

appears to incorporate affirmative governmental duties into constitutional prohibitions.

The circumstances under which a constitutional tort might arise were identified by their absence in *DeShaney v. Winnebago County Department of Social Services*.[218] *DeShaney* held that welfare workers had no affirmative duty to protect a child under their supervision from his abusive father, and therefore the child was precluded from suing the welfare workers charged with responsibility for his child-abuse case.[219]

Nonetheless, the Supreme Court acknowledged that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and well-being."[220] This duty would arise in prisons[221] and in some state mental hospital settings.[222] An unauthorized deprivation imposed on a confined individual could encompass both substantive and procedural due process violations.[223] The majority offered a "simple" rationale: the state-imposed restraints on the involuntarily institutionalized person make him unable to care for himself or act on his own behalf.[224] He must therefore rely on the state to provide for his basic needs.

To explore the implications of this emphasis on custody, it is instructive to return to section 1983's central purpose of placing the federal courts "between the States and the people."[225] When there

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218. 489 U.S. 189 (1989).

219. *Id.* at 202. The child's parents were divorced and custody had been awarded to his father. The § 1983 complaint filed by the child and his mother documented a series of severe injuries which the county social services authorities were aware of and had recorded in their files. The abuse culminated in brain injuries that were so severe that the four-year old boy was confined to an institution for the profoundly retarded. The father was subsequently convicted of child abuse.

220. *Id.* at 199-200. This conclusion was linked to substantive due process requirements.

221. *Id.* at 198-99 n.5 (citing Whitley v. Albers, 475 U.S. 312, 326-27 (1986) (shooting of prison inmate)); *see also* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-46 (1983) (government must provide medical care to suspects in police custody who are injured in the course of an arrest).

222. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 314-25 (1982) (unconstitutional to confine an involuntarily committed patient in an institution for the mentally retarded in unsafe conditions such that the patient may suffer self-inflicted wounds and injuries inflicted by other residents).

223. 489 U.S. 189 (citing among other examples the shackling of mental patients in *Youngberg*, 457 U.S. at 316).

224. *Id.* at 200.

225. Mitchum v. Foster, 407 U.S. 225, 242 (1972). *See supra* notes 58-59 and accompanying text. *See also* Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959,

is misuse of state office, the vast difference between the power of the individual and that of the governmental actor necessitates a federal response. The Supreme Court has recognized the fourteenth amendment's applicability where oppression by the state occurs,[226] but has not linked this to power differentials that are increased in a situation of involuntary confinement. Disparity of power is compounded when it is manifested before, during, and after the violation—that is, when an individual is placed under state control, subjected to unauthorized deprivation by the deliberate act of a state employee,[227] and finally denied adequate state redress.[228]

Does the special federal interest in preventing abuse of those in state custody override *Parratt*'s requirement that procedural due process cases be deported to state courts if adequate remedies are provided there? *DeShaney*, after all, used substantive due process language in analyzing the rights of mental patients and prisoners to state protection.[229] Arguably, *Parratt*'s restrictions no longer apply to suits brought by such claimants.[230] Random and unauthorized

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975-76 (1987) (reviewing the historical evidence that members of the 1871 Congress which enacted § 1983's predecessor were concerned about local judges "who are made little kings, with almost despotic powers to carry out the partisan demands of the Legislature which elected them . . . without regard to law or justice . . . .").

226. *See, e.g.*, Davidson v. Cannon, 474 U.S. 344, 348 (1986); Daniels v. Williams, 474 U.S. 327, 331 (1986).

227. *See* Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984). This pre-*Daniels* article argues that a § 1983 defendant's recklessness should be sufficient to permit constitutional adjudication and suggests that this argument is more appropriate where government control over individuals is exercised. *Id.* at 242-45. Included as examples of those within such official control are prisoners, inmates of public institutions, and children stranded in a car on a highway after the driver was arrested. *Id.* at 242-44. *See* White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

228. *See* Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 272 (1986). In a perceptive article, Professor Whitman discusses "the special problems created by the massing of power in institutions," *id.* at 275, suggesting among other things that in *Parratt* cases an alternative remedy might be to grant a declaration or injunction requiring that adequate postdeprivation process be accorded. *Id.* at 268.

229. *See supra* subpart III(A), concluding that casting *Parratt* cases as substantive instead of procedural would be more logical as well as more flexible.

230. The Supreme Court has allowed a federal forum where rights are "fundamental," for example where a suspect's stomach was pumped to obtain evidence against him. Rochin v. California, 342 U.S. 165, 169-71 (1952). Unjustified attacks by state officers themselves should be placed in this unique category as a denial of the confined person's fundamental rights under *Rochin*'s shock-the-conscience test. *Id.* at 172. Factual disputes about whether the assaulted person seemed to be threatening the officer could still blur the legal issue in some instances. For example, in Whitley v. Albers, 475 U.S. 312, 316 (1986), a prisoner was shot by prison officers attempting to stop a riot. The Court applied a substantive due process analysis, but the prisoner lost on the merits. *Id.* at 326-28.

Specific Bill of Rights guarantees have also been accorded a federal forum. *See*

violations, however, have been resolutely differentiated from other deprivations.[231] The majority opinion in *DeShaney* does not indicate that all custodial cases must be kept in federal courts.[232]

Nonetheless, the conclusion that due process claims relating to involuntarily confined persons involve a federal interest distinct from common law concerns should significantly affect state adequacy determinations.[233] In this category of cases, state redress should bear a substantial similarity to that available under section 1983.[234] Such a standard would require that district courts view the

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supra note 202. *See* Monaghan, *supra* note 205, at 991-93 (discussing distinctions between these guarantees and "fundamental" rights).

231. *See* Zinermon v. Burch, 110 S. Ct. 975 (1990), where plaintiff in a § 1983 suit alleged that state officers had deprived him of liberty without due process by admitting him to a mental hospital as a "voluntary" patient when he was incompetent to give informed consent to this admission. One reason *Parratt* was inapplicable was that the deprivation was not unpredictable, and therefore predeprivation procedural safeguards might have prevented the violation. *Id.* at 989. Although it is unconstitutional to confine mentally ill persons involuntarily unless they are a danger to themselves or others, and the violation here was foreseeable, the Court did not decide whether the challenged conduct would have constituted a substantive due process infringement. *Id.* at 987-88, 990. The complaint could have been read to include such a claim, but this issue was not raised in the petition for certiorari. *Id.* at 983-84.

While the majority concluded that *Parratt* limitations do not apply to substantive due process cases, *id.* at 983, Justice Blackmun's opinion for the Court reaffirmed that challenges to random and unauthorized violations by state officials will not be granted a federal forum unless the state fails to provide adequate postdeprivation remedies. *Id.* at 989-90. *Parratt* governs such challenges even where liberty is infringed, *see supra* note 189, and where the official misconduct is deliberate: "In *Hudson*, the errant employee himself could anticipate the deprivation since he intended to effect it, but the State still was not in a position to provide predeprivation process since it could not anticipate or control such random and unauthorized intentional conduct." 110 S. Ct. at 989 (citing Hudson v. Palmer, 468 U.S. 517, 533-34 (1984)).

The Court reasoned that in *Burch*, the state had delegated to mental hospital employees the authority both to confine patients and to "initiate the procedural safeguards set up by state law to guard against unlawful confinement." 110 S. Ct. at 990. Such safeguards included a judicial hearing which was to precede any involuntary admission lasting more than five days. *Id.* at 981-82. *Parratt* and *Hudson* were differentiated because in those cases, officials were not given delegated authority to cause deprivations or to decide whether pre-deprivation process would be accorded. *Id.* at 990. Thus, the majority refused to equate the *Hudson* guard's power to destroy an inmate's property with the *Burch* staff's power to grant or deny a hearing, although both powers may be wrongfully exercised.

232. *DeShaney* cites with approval *Davidson* and *Daniels*, opinions issued after the custody decisions *DeShaney* discusses. 489 U.S. at 196; *see supra* notes 188-98 and accompanying text (analyzing *Davidson* and *Daniels*).

233. The fact that this conclusion arises from a substantive due process analysis emphasizes the error in *Parratt*'s approach to misconduct that is unlawful regardless of the procedures attached to it. *See supra* subpart III(A).

234. *See supra* note 162 and accompanying text. *See also* Note, Parratt *and* Taylor *Revisited: Defining the Adequate Remedy Requirement*, 65 B.U.L. REV. 607, 634 & n.185 (1985) (suggesting that noncompensatory features such as attorneys' fees may not be essential

state remedy realistically,[235] rather than assuming that any tort analogue provides effective relief.[236] However, the section 1983 plaintiffs would retain the burden of proof as to all aspects of their claims,[237] including lack of substantial similarity between federal and state redress.

2. Application of the Substantial-Similarity Standard.—The proposed substantial-similarity requirement would be flexible enough to make distinctions based on the seriousness of the misconduct. Prison assaults by one inmate against another can result in severe injuries if, despite prior warnings, guards do nothing to avert the attack.[238] Inmates are dependent on official protection because they are not permitted to fight, even in self-defense. Property crimes can also do significant harm. In our prior example, a mental patient's legal documents are intentionally destroyed in an action unrelated to confiscation of contraband.[239] The state fails to provide a sufficient post-deprivation remedy with the result that ruined affidavits from overseas witnesses cannot be satisfactorily reconstructed.[240]

By contrast, some deprivations may have little impact. Pre-

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elements of an adequate state remedy; however, formal remedies coupled with "significant obstacles" like state immunity provisions would be inadequate).

235. In the adequate-state-grounds context, the Supreme Court has set aside self-serving arguments by states and examined local provisions with care. *See supra* Part I. Lower courts have varied dramatically in their handling of adequacy determinations in constitutional torts cases. *See infra* subpart III(C).

236. *See infra* note 371, discussing state-to-state variation in the effectiveness of survival statutes designed to compensate the families of wrongful-death victims for lost financial support. *See also* Note, *supra* note 234, at 645 nn.234-40 and accompanying text (pointing out possible deficiencies in recoveries under state survival and wrongful death statutes).

237. *See infra* note 377 and accompanying text. A plaintiff need not exhaust administrative remedies. *See* Patsy v. Board of Regents, 457 U.S. 496, 500-16 (1982) (holding that exhaustion of state administrative remedies is not a prerequisite to an action under § 1983). *See also supra* note 68, and *infra* note 307 (discussing *Patsy*). The mini-exhaustion requirement potentially applicable to prisoners who bring § 1983 suits has had little impact. *See infra* note 307.

238. For example, in Davidson v. Cannon, 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting), plaintiff "suffered stab wounds on his face and body as well as a broken nose that required surgery."

Professor Abernathy persuasively argues that the courts must develop guidelines for standards of care in incarceration settings. Abernathy, *supra* note 209, at 1483-88. Such standards become more complex where the guard himself has not engaged in the harassment or assault, but has deliberately permitted it to occur. *Id.* at 1486-87.

239. *See supra* note 12 and accompanying text.

240. *See* Hudson v. Palmer, 468 U.S. 517, 535-37 (1984), which relegated the plaintiff, a prisoner, to vaguely described redress in the state courts after his legal materials and other property were intentionally destroyed. *See supra* note 208 and accompanying text (discussing circuit court treatment of such cases).

sume, for example, that a prisoner's hobby kit is intentionally stolen by prison personnel and then thrown away. Neither section 1983 nor the state provision need do more than make the inmate whole for the loss; the equivalent of a small-claims procedure in state court would be sufficient. However, the mere right to file suit against defendants who are immunized in state court would be inadequate per se. Recompense should be available, if only to underline the government actor's duty to refrain from harassing inmates and to encourage prison management to reduce such incidents.[241]

In noncustodial situations, state common law or statutory remedies that provide more than nominal redress are generally appropriate. Caution is dictated by the subordinating effect of constitutional rulings on tort systems that are appropriately responsive to local conditions and resources. Because such a ruling could not be altered by state law,[242] a requirement of approximation between state and federal redress should not routinely be imposed.[243]

In the class of cases governed by the substantial-similarity standard, should a balancing process assigning some weight to the

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241. *Cf. Hudson*, 468 U.S. at 528, where the Court, in the context of rejecting plaintiff's fourth amendment claim of an unreasonable search and seizure of his property, stated that "of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society." Under certain circumstances, harassment could rise to the level of an eighth amendment cruel-and-unusual-punishment violation. *Id.* at 530. *See also* Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1740 & n.128 (1989).

Note that if *Parratt* had adopted a substantive due process standard rather than a procedural approach, federal jurisdiction for cases involving trivial property thefts might well be unavailable, since the pivotal issue would be the nature of the injury rather than the adequacy of the state remedy. *See supra* note 205 and accompanying text.

242. *See, e.g.*, Martinez v. California, 444 U.S. 277, 284 (1980). *See also* Whitman, *supra* note 180, at 5, 30-40 (discussing state interests in controlling the development of tort law).

243. There may be classes of cases where the power disparity between individual and government employee is slight, and therefore no special federal interest is implicated. For example, a fire fighter employed by a municipality gains access to a house because he is responding to a blaze on the first floor. After extinguishing the fire, he pockets an art object as he leaves. Such a random and unauthorized act, a tort under common law, could be remedied by state processes that are more limited than those afforded under § 1983.

Moreover, caseload considerations cannot be discounted, even though the potential torrent of constitutional tort litigation has been significantly reduced by exclusion of negligent acts from federal review. *See supra* subpart III(A) (discussion of *Daniels* and *Davidson*). Artful pleading could, of course, be used to transform negligence into intention, but summary judgment might well dispose of many of such attempts. For example, no evidence would support the claim that Taylor's hobby kit was intentionally rather than carelessly misplaced. In light of the federal docket's bulk, state procedures that offer more than nominal redress may be preferable to federal monitoring of concerns that differ little from those pertinent to a controversy between private citizens.

state's interest be mandated under the calculus developed in *Mathews v. Eldridge*?[244] The *Mathews* standard, which emerged in the context of a request for a hearing prior to termination of social security benefits, pitted plaintiff's private interest against the government's stake in not providing further procedural safeguards.[245]

Mathews assessed a state policy of withholding pre-deprivation process.[246] It could therefore be distinguished from cases such as *Parratt*, which concern post-deprivation relief for random and unauthorized conduct. In the former situation, the state has an interest in a particular method of implementing an official rule. Moreover, denial of a prior hearing would not preclude judicial consideration after the injury.

Conversely, in *Parratt* and *Hudson*, an acknowledged violation of state law was ripe for redress. Because there is no state interest in official misconduct, any weighing process would match plaintiff's property or liberty rights against the state's decision to supply inadequate recompense for such misconduct. Even if *Mathews* were relevant to all procedural disputes, its balancing test would not be satisfied by illusory or insubstantial relief premised on state convenience. Procedural due process is not a mere manifestation of efficiency.[247] Nor do immunities, even those rooted in common law, necessarily restrict the ambit of section 1983.[248] Post-deprivation

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244. 424 U.S. 319, 335-49 (1976). Zinermon v. Burch, 110 S. Ct. 975, 985 (1990), characterized *Parratt* and *Hudson* as "a special case of the general *Mathews* . . . analysis" because no pre-deprivation process was possible in such cases. The Court did not explore the question of how the *Mathews* criteria would apply in assessing the adequacy of postdeprivation remedies. *Parratt* merely noted that its analysis was "quite consistent" with the approach taken in Ingraham v. Wright, 430 U.S. 651, 682 (1977), which cited the *Mathews* balancing test. *See* Parratt v. Taylor, 451 U.S. 527, 542 (1981); *see also* Daniels v. Williams, 474 U.S. 327, 328, 331, 335 (1986); Hudson v. Palmer, 468 U.S. 517, 533 n.14 (1984); *see infra* note 250 discussing Ingraham v. Wright, 430 U.S. 651 (1977).

245. The *Mathews* balancing test requires consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

246. 424 U.S. at 323. *But cf. supra* note 201 and accompanying text (discussion of Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)).

247. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 90 (1972). *See also* Goss v. Lopez, 419 U.S. 565, 580 (1975) (noting that procedural safeguards should be provided if the cost is not "prohibitive").

248. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 243 (1974). *Cf.* Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (concluding that the same considerations of public policy that underlie the common-law rule of immunity likewise apply to § 1983 immunity). *See infra*

process analyses such as that constructed in *Ingraham v. Wright*[249] have regarded common-law remedies as possible substitutes for federal aid, but only where such redress is "fully adequate" to insure due process.[250]

An appropriate balance has already been incorporated into the proposed standard, which excludes noncustodial situations from its ambit. Classes of cases where the official actor does not have total authority over the private individual would not be subject to the substantial-similarity requirement. Thus, the *Mathews* layer would allow a double counting of state interests.

Hudson's "meaningful" redress requirement[251] was addressed to all constitutional tort litigation. It is particularly significant where distinct federal concerns are implicated—as in a section 1983 suit in which compulsory confinement facilitates unremediable misconduct. Plaintiff in such suits must not only have access to a state hearing that engenders fair fact-finding,[252] but must also have relief consonant with the magnitude of the injury.[253]

C. *Lower Court Interpretations of Procedures Adequate to Satisfy Due Process*

The mixed signals sent by the Supreme Court on what constitutes an adequate remedy are well illustrated by the Eleventh Circuit's decision in *Rittenhouse v. DeKalb County*.[254] It was undisputed that state law immunized all the defendants from liability.[255] Facing

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subpart III(C) for a discussion of lower court confusion over immunity issues in *Parratt* cases.

249. 430 U.S. 651 (1977).

250. *Id.* at 672. A central issue in *Ingraham* was whether school authorities who administered severe corporal punishment to junior high school students without notice or hearing violated due process guarantees. The Supreme Court concluded that there was no such violation because the student would have the right under common law, as reflected in a state statute, to receive a damage award after the paddling if the punishment was excessive. *Id.* at 675-76, 677 n.45.

251. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

252. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 344-45 (1976).

253. *See supra* notes 233-37 and accompanying text.

254. 764 F.2d 1451 (11th Cir. 1985). In *Rittenhouse*, plaintiff brought a § 1983 action against a county water and sewer authority and a county official, claiming that defendant had failed to repair a leaking pipe after being warned of the hazardous conditions surrounding the water flow. *Id.* at 1452-53. The leaking water froze during the night after the call, creating an ice slick on a roadway which contributed to an automobile accident that killed plaintiff's child. *Id.* at 1452. *Rittenhouse* pre-dated the Supreme Court's ruling in *Daniels*, and therefore the county's negligence was still a valid basis for applying *Parratt* standards. *See supra* notes 187-90 and accompanying text.

255. 764 F.2d at 1457. The county was immune by statute from negligence liability.

"conflicting indications in Supreme Court authority"[256] as to whether such immunity vitiates a claim that post-deprivation process is really available, the circuit court proceeded to draw up a score sheet. Inferences drawn from *Parratt* and *Hudson* were balanced against dicta from other opinions.[257] At the end of this exercise, the court concluded that any doubts about the appropriateness of immunity barriers were to be resolved in the state's favor if the defensive provisions were traditional or not "irrational."[258] Under this standard, the section 1983 plaintiff's deprivation of property (or liberty) could give rise to a right with merely a paper remedy.

Automatic federal deference to an uncertain or fruitless state procedure has appeared in diverse contexts. For example, one suit filed by a plaintiff whose property was seized by New Hampshire state officers and not returned despite court orders directing restoration, was dismissed because several years of delay did not constitute a deprivation; the state had "not yet refused" to provide a remedy.[259] The court made no attempt to analyze or justify the

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The official who was a named defendant was immune under Georgia common law. 764 F.2d at 1457.

256. *Id.*

257. *Id.* at 1457-59. *Parratt* sought an actual remedy, from which it could be inferred that the lack of such a remedy might have supported federal jurisdiction. Justice Powell's concurrence explicitly concluded that immunity which cuts off all state remedies would effect a deprivation of procedural due process. Parratt v. Taylor, 451 U.S. 527, 551 n.9 (1981) (Powell, J., concurring). Similarly, Hudson v. Palmer, 468 U.S. 517, 535-36 (1984), held that state procedures were adequate only after concluding that state law accorded no immunity to defendants.

On the other hand, a pre-*Parratt* opinion had held that although an immunity statute that blocked a wrongful death action might be a "deprivation," the state could fashion its own tort rules without constitutional restriction unless its provision was "wholly arbitrary or irrational." Martinez v. California, 444 U.S. 277, 282-83 (1980). Although only state law questions were at issue in *Martinez*, its reasoning was used in *Rittenhouse* to bless traditional governmental immunities. 764 F.2d at 1458. Further encouragement for this view was found in the post-*Parratt* decision in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982), which granted federal jurisdiction to plaintiff but noted in dictum that the state could validly create substantive defenses or immunities. *See supra* note 201.

258. *Rittenhouse*, 764 F.2d at 1458. *Cf.* Ausley v. Mitchell, 748 F.2d 224, 227-29 (4th Cir. 1984) (en banc) (Winter, J., concurring in part) (asserting that uncertainty of state law regarding the availability of sovereign immunity cast doubt on whether state remedies were adequate). *See also* Waterstraat v. Central State Hosp., 533 F. Supp. 274, 276 (W.D. Va. 1982), where the court found that individual state employee defendants were subject to tort suit and therefore state remedies were adequate even though the state claimed sovereign immunity as an entity.

259. Decker v. Hillsborough County Attorney's Office, 845 F.2d 17, 22 (1st Cir. 1988) (per curiam). Police, acting under allegedly questionable search warrants, searched plaintiff's residence and seized personal property, only a small part of which was used at his state criminal proceeding. *Id.* at 19. After trial, plaintiff filed a motion for return of

state's interest in spinning out the time during which plaintiff was deprived of the use of his property. Yet the Supreme Court in pre-*Parratt* cases required such an analysis to determine whether excessive delay rises to the level of a denial of due process.[260]

Federal circuit judges have also displayed exaggerated deference to state tribunals in the face of charges of bias and impropriety on the part of a trial judge. Texas oil company owners contended that a state judge arranged to have a suit against them brought before his court contrary to the usual procedure for assigning cases and that he imposed receiverships on their assets in direct defiance of higher court orders.[261] Their section 1983 suit was rejected on the grounds that the right to a fair trial is a matter of procedural rather than substantive due process, and that recourse to appellate tribunals that dismissed their case on procedural grounds had provided adequate post-deprivation remedies.[262] This conclusion

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his legal, noncontraband property. However, the trial judge, during a hearing at which plaintiff was not present, ordered a part of the property destroyed and the remaining property returned to plaintiff. Despite repeated efforts by plaintiff to obtain the seized objects, none of the property was returned. Plaintiff brought a § 1983 action in federal court asserting due process claims, but these claims were dismissed. The First Circuit affirmed, holding that plaintiff was pursuing existing post-deprivation state remedies for the return of his property. The court also ruled that the "flagrant disobedience" of an earlier state court order to return this property did not deprive plaintiff of due process despite a delay of over three years, because it was "not apparent that plaintiff cannot ultimately achieve some effective relief . . . in the state court system." *Id.* at 22.

260. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985) (nine-month delay was not excessive where it was caused in part by the thoroughness of procedures); United States v. $8,850 in United States Currency, 461 U.S. 555, 564 (1983) (18-month delay before the filing of a postseizure forfeiture hearing was deemed not excessive after balancing the reasons for the time gap against prejudice to claimant); Barry v. Barchi, 443 U.S. 55, 66 (1979) (due process was violated where a horse trainer's license was suspended without prompt hearing). *Cf.* Gregory v. Town of Pittsfield, 470 U.S. 1018, 1022-23 (1985) (O'Connor, J., dissenting from denial of certiorari) (procedures were inadequate when they did not provide for recovery of damages for a one-year delay in providing welfare benefits).

261. Holloway v. Walker, 784 F.2d 1287, 1289 (5th Cir. 1986).

262. *Id.* at 1292-94. Plaintiffs brought a § 1983 action against the judge and other parties alleging a conspiracy resulting in deprivation of due process rights. They subsequently perfected their appeal of the state court action but did not post a supersedeas bond to stay execution of the state judgment. *Id.* at 1290. Their appeal was denied by the the state's intermediate appellate court. Humble Exploration Co. v. Browning, 690 S.W.2d 321 (Tex. Ct. App. 1985) (en banc), *reinstating* 677 S.W.2d 111 (Tex. Ct. App. 1984). The federal district court subsequently granted summary judgment to defendants on plaintiff's § 1983 action. 784 F.2d at 1290.

More often, however, the federal court merely mentions that the state provides an adequate remedy, without the slightest analysis. *See, e.g.*, Riley v. Jeffes, 777 F.2d 143, 147-48 (3rd Cir. 1985) (prisoner alleged that officials gave certain inmates keys to cell doors; plaintiff's fear of assault was cognizable under the eighth amendment but his fourteenth amendment claim concerning theft of his property would not be heard under

strangely blurs the distinction between fundamental and nonfundamental rights.[263]

There are further implications of such decisions. Suppose the federal plaintiff had dutifully pursued state "remedies," only to find that the available procedures afforded no opportunity to reclaim property taken by state officials without authority. If the federal court decides that plaintiff should have realized the futility of this journey through state tribunals, he may be faced with a ruling that claim preclusion[264] blocks access to federal relief.[265] This approach

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§ 1983); Hossman v. Spradlin, 812 F.2d 1019, 1023 (7th Cir. 1987) (per curiam) (no due process violation because the state remedy was adequate), *see supra* note 208 (further discussion); Wilson v. Town of Clayton, 839 F.2d 375, 383 (7th Cir. 1988) (noting a challenge to the adequacy of the statute at issue in *Hossman* and merely citing *Hossman*'s mention of adequacy as dispositive). *Compare* the sophisticated and thorough dissent of Judge Norris in Punton v. City of Seattle, 805 F.2d 1378, 1383-86 (9th Cir. 1986) (Norris, J. dissenting):

> [W]hile the majority recognizes it must consider . . . whether the state's post-deprivation process is fully 'adequate' to satisfy due process requirements . . . the majority never engages in such an analysis. A federal court must do far more than offhandedly assert that 'a remedy . . . *colorably* satisfies due process,' . . . to ensure that a state postdeprivation remedy is truly adequate before invoking *Parratt v. Taylor* . . . to bar a § 1983 action.

Id. at 1384 n.2 (emphasis added by Judge Norris). *See infra* note 266 (further discussion of *Punton*).

263. *See supra* notes 208, 231. *See also* Monaghan, *supra* note 205, at 991 n.83.

264. Claim preclusion includes the doctrine of merger, which holds that if a plaintiff obtains a final judgment in his favor, his claim is extinguished, merged in the judgment and therefore cannot be relitigated. The judgment is substituted for the claim. F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 11.3, 11.7 (3d ed. 1985). Similarly, if plaintiff loses in his action, his claim is extinguished. The doctrine of bar, which is also included in claim preclusion, prevents relitigation of the same claim. *Id.* In either case, the winner may successfully plead res judicata. Where only the theory of recovery differs, a second action by plaintiff against the same defendant on the same facts will generally be precluded by the courts. *See, e.g.*, Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434, 438-39 (6th Cir. 1981); Roach v. Teamsters Local Union No. 688, 595 F.2d 446, 450-51 (8th Cir. 1979); Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464, 470 (3rd Cir. 1950), *cert. denied*, 341 U.S. 921 (1951).

See also Redish, *supra* note 4, at 107, discussing Allen v. McCurry, 449 U.S. 90, 105 (1980), in which the Court held that the doctrine of collateral estoppel—the binding effect of litigating an issue in a previous cause of action—barred relitigation of claims that might have been brought in an earlier case arising out of the same facts. Professor Redish notes: "Since it is well established that state and federal courts have concurrent jurisdiction over section 1983 suits, a failure to raise a section 1983 claim in the course of the state judicial action would bar a subsequent federal suit." Redish, *supra* note 4, at 107.

265. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 777-79 (5th Cir. 1984). Plaintiff suffered injury in an accident in a high school woodworking class, and sued the teacher and the school district in state court. The court granted summary judgment to defendants based on sovereign immunity under Texas law. Plaintiff subsequently brought a § 1983 action in federal court, which rejected the res judicata defense asserted by defendants and entered judgment for plaintiff. The Fifth Circuit reversed,

invites more rather than less traffic to the federal gates, although initial resort to section 1983 risks dismissal—which may also occur after the statute of limitations on the state claim has lapsed. If plaintiff attempts to litigate in both federal and state courts in order to get the combined relief necessary to make him whole, he may be held to have made an "election" which precludes him from abandoning a state remedy that "colorably" satisfies due process.[266]

Although some courts unwisely presume adequacy, or create no-win situations for litigants, other judges have been rigorous in examining state remedies. Consider, for example, *Parrett v. City of Connersville*,[267] where a police officer who had been constructively discharged was required to use a grievance procedure which did not accord full due process. Judge Posner's opinion for the circuit court thoroughly analyzed the limitations imposed in the course of the state procedure, concluding:

> This is not to say that arbitration cannot satisfy the requirements of due process unless the arbitrator is empowered to

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ruling that plaintiff should have added the § 1983 claim to his state court action and that, in the absence of different facts and measure of recovery, a different theory of recovery was insufficient to override the res judicata affirmative defense. *Id.* at 777.

266. *See* Punton v. City of Seattle, 805 F.2d 1378, 1383 (9th Cir. 1986). An officer dismissed from the police force for infraction of departmental rules without being advised of charges or afforded a hearing prior to dismissal, appealed to the Public Safety Civil Service Commission. The Commission held that its jurisdiction did not include constitutional due process issues and affirmed. *Id.* at 1379. Plaintiff subsequently appealed to a state trial court which ordered reinstatement with back pay and attorney's fees. The Washington intermediate appellate court subsequently held that the award of attorney's fees was beyond the state court's jurisdiction. Punton v. City of Seattle Pub. Safety Comm'n, 32 Wash. App. 959, 970, 650 P.2d 1138, 1144 (1982). Plaintiff had meanwhile filed a federal action, seeking damages under § 1983 which had not been pleaded or received in state court. Once the state trial court judgment was granted, plaintiff sought to prevent the city from relitigating liability issues under the doctrine of collateral estoppel. The city claimed that the federal action was barred because plaintiff had already received all appropriate relief in state court. The federal jury found for plaintiff and the city appealed. 805 F.2d at 1380.

The Ninth Circuit reversed, indicating that plaintiff had tried to set up offensive collateral estoppel for claims under § 1983, *id.* at 1381-82, and that plaintiff may not abandon a state remedy that substantially compensates him "merely because litigation strategy and . . . a more adequate award" make a federal action more attractive. *Id.* at 1383.

The dissent concluded that the state remedy was not adequate because the state was precluded under state law from assessing all of plaintiff's damages and could not award the relief sought in federal court. *Id.* at 1385 (Norris, J., dissenting). The dissent declared that "[u]nder the majority's analysis litigants could never bring a § 1983 action in federal court unless they first had asserted the same action in state court. This, of course, is not the law. *See* Patsy v. Board of Regents, 457 U.S. 496 (1982)." 805 F.2d at 1384 n.2 (parallel citations omitted).

267. 737 F.2d 690 (7th Cir. 1984).

> award full common law damages. But if he cannot, then he must be able to prevent the harm to the grievant before it occurs, which requires faster action than was taken by the arbitrator in this case.[268]

Other courts have scrutinized a state's case law as well as its statutes to ensure that a remedy for a section 1983 plaintiff would in fact be accorded.[269]

To what extent has the approach in *Deakins v. Monaghan*,[270] requiring a federal "wait and see" response to an uncertain state remedy,[271] been reflected in the *Parratt* area? Concern about remedies that give only part of what the federal plaintiff requests has been evidenced in some procedural due process cases.[272] A few courts have also held that a section 1983 action should be "dismissed without prejudice and in the event that the state court . . . [does not accord an apparent remedy], plaintiff may petition to re-open [that] claim."[273] These are additional lower court options that offer

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268. *Id.* at 697. Plaintiff was the town's chief of detectives. He had investigated the daughter of a man who subsequently was appointed city attorney. Plaintiff was pressured by the city attorney to resign, but when he refused, the city attorney arranged a change of duty imposing enforced idleness, which led plaintiff to illness and retirement. *Id.* at 692-93. Plaintiff argued that this constituted constructive discharge and that he was deprived of property without due process. The court agreed, finding that the enforced idleness was humiliating for an "ambitious professional"; "depreciated plaintiff's professional skills," making it difficult for him to resume his career effectively elsewhere; and the position was "intolerable" for a person "with some self respect." *Id.* at 694.

269. *See, e.g.*, the opinion of Chief Judge Cummings and the concurrence of Judge Easterbrook in Gumz v. Morrissette, 772 F.2d 1395, 1404, 1409 (7th Cir. 1985) (actions for recovery of personal property, unlawful withholding or conversion of that property, or trespass constitute acceptable state remedies; defendants not immune under state law and the existence of adequate state remedies counters plaintiff's fourteenth amendment allegations); Williams v. St. Louis County, 812 F.2d 1079, 1082-83 (8th Cir. 1987) (state court's lack of a basis for its denial of plaintiff's in forma pauperis status created a constitutional issue and rendered an otherwise adequate state post-deprivation remedy inadequate); Drogan v. Ward, 675 F. Supp. 832, 836-37 (S.D.N.Y. 1987) (a pending delayed state proceeding had deprived plaintiff of a property interest, but the deprivation was not reviewable in state courts).

270. 484 U.S. 193 (1988).

271. *Deakins*, an abstention case, is discussed in detail *supra* subpart II(C).

272. *See, e.g.*, Parrett v. City of Connersville, 737 F.2d at 697; Bumgarner v. Bloodworth, 738 F.2d 966, 968 (8th Cir. 1984) (per curiam) (inadequacy was found in a state remedy according damages but no specific relief for unlawful seizure of property that had sentimental value); Rutherford v. United States, 702 F.2d 580, 584 (5th Cir. 1983) (compensation for mental anguish cannot be awarded under a state procedure for recovery of excess taxes; the procedure is therefore inadequate). *But see supra* subpart III(A) (discussing statements in *Parratt* and its descendants that relief in the state courts need not be as complete as would be available under § 1983).

273. Reich v. Beharry, 686 F. Supp. 533, 534 (W.D. Pa. 1988). In *Reich*, plaintiff had been engaged as a special prosecutor in the criminal prosecution of defendant, the County Controller. After the jury found defendant not guilty of the charges, the defend-

heightened scrutiny of state law while synthesizing the interests of the federal judiciary, the states, and the section 1983 litigant.

IV. JUDICIAL RATIONALES FOR TREATMENT OF AMBIGUITIES OR OBSTACLES IN STATE LAW

In each jurisdictional area that this Article has examined, a federal tribunal asked to adjudicate a federal claim considers the possibility of restricting the litigant to a state determination instead. Such consideration can entail a serious analysis of the state forum or, conversely, involve little more than the brief ritual of asserting that this alternate forum is adequate. These discordant approaches stem from separate lines of Supreme Court cases.

One might postulate that different contexts justify different levels of scrutiny. To test this proposition, it is instructive to compare the rationales that have propped up disparate judicial choices. Phrases that routinely recur in federal court opinions concerning the adequacy of state processes are "efficiency," "equity," "avoiding disruption" and "fostering federalism and comity." While these terms have a persuasive ring, they ultimately fail to justify inconsistent versions of adequacy.

A. Efficiency and Overload: The Understated and Unstated Rationales

Efficiency and overload considerations substantially affect Supreme Court treatment of ambiguous state law. On one level, efficiency means assuring a hearing for federal claims with a minimum of unnecessary effort.[274] On another level, it may be efficient to handle adequacy determinations by making assumptions rather than by making inquiries. The latter brand of efficiency is directly related to the problem of federal court overload, which is eased when a case is deported—on any rationale—to a state tribunal.

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ant repeatedly refused to issue payment of bills for plaintiff's services. Plaintiff then brought a § 1983 suit against both the County and the Controller, asserting deprivation of a property interest without due process and pendent state claims. The district court, citing *Parratt*, held that plaintiff was required to pursue available state remedies. *Id.* at 534-35. *See also, e.g.*, Loftin v. Thomas, 681 F.2d 364 (5th Cir. 1982). In *Loftin*, a prisoner claimed that a deputy sheriff took his personal clothing while in custody, and that the loss constituted negligent deprivation of his property without due process of law. The court of appeals found that an adequate state remedy existed but held that should plaintiff's claim be denied for any reason but lack of merit, he might again seek § 1983 relief. *Id.* at 365. *Loftin* was cited with approval in Thompson v. Steele, 709 F.2d 381, 383 n.3 (5th Cir. 1983).

274. *See, e.g.*, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500-01 (1941), discussed *supra* section II(A)(2).

1. Justifiable Efficiency.—The only recourse for a civil litigant whose federal claim is procedurally barred in the state courts is United States Supreme Court review.[275] *Hathorn v. Lovorn*[276] and its predecessors stressed that a state procedural ground that is not "strictly or regularly followed" cannot preclude such review.[277] In applying this standard, *Hathorn* carefully scrutinized prior state opinions, with special emphasis on recent precedents.[278]

It might be argued that the Supreme Court's exacting methodology in such adequate-state-grounds decisions is dictated by the finality of the litigation stage that has been reached. It is efficient to exercise the power to examine inconsistent state law at the last moment that federal rights can be preserved. Federal district court jurisdiction invoked before a state proceeding has concluded is distinguishable and can entail a different level of scrutiny.

This argument contains critical flaws. Federal intervention in a pending state proceeding can be sought at the trial or post-trial stage.[279] In the constitutional tort context, relief in the district court has been requested before a state action commenced,[280] after years of state litigation[281] or after a state ruling.[282] These factually variegated section 1983 situations now have an element in common: Supreme Court consideration would only be available by certiorari discretion.[283] In the *Pennzoil* and *Parratt* areas, the federal district court that dismisses the plaintiff generally will be the last federal stop in all but a tiny percentage of cases in which a subsequent state

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275. *See supra* subpart I(A). Defendants in criminal cases, who have failed to obtain certiorari review of a state court conviction, could still seek habeas corpus in a federal district court under 28 U.S.C. § 2254 (1988).

276. 457 U.S. 255 (1982), discussed *supra* Part I.

277. *Id.* at 262-63 (citing with approval Barr v. City of Columbia, 378 U.S. 146, 149 (1964)).

278. *Id.* at 263-65.

279. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 39 (1971), discussed *supra* section II(A)(1) (injunction sought against a pending prosecution); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 6 (1987), discussed *supra* subpart II(B) (intervention was sought after the conclusion of trial).

280. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 520 (1984).

281. *See, e.g.*, Decker v. Hillsborough County Attorney's Office, 845 F.2d 17, 19-20 (1st Cir. 1988) (per curiam), discussed *supra* note 259.

282. *See, e.g.*, Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 777-79 (5th Cir. 1984), discussed *supra* note 265.

283. In 1988, the Supreme Court's appeals jurisdiction was virtually eliminated. *See* Pub. L. No. 100-352, 102 Stat. 662 (1988) (amending 28 U.S.C. §§ 1254, 1257 (1982) and related sections). *See supra* note 19. The effect of the amendment was, among others, to preclude the mandatory appeals jurisdiction that had previously been available where: (1) a state court held a state law valid against a federal claim; and (2) where a federal court held a state statute unconstitutional.

determination is reviewed by certiorari.[284] Thus, the parallel to the last-chance *Hathorn* litigation stage becomes more apparent.

Yet a difference between *Hathorn* and the other areas must be taken into account. In the adequate-state-grounds decisions, there is no need to speculate about what the state will do because the procedural barrier has been acknowledged and the record is closed. On the other hand, in cases similar to *Pennzoil* and *Parratt*, the district court must generally make a prediction about whether the state forum will be receptive to the federal questions—and a hard-to-rebut presumption of receptivity takes less time than inquiry.

Nonetheless, a judicial decision based on a realistic look at the adequacy of state processes assures a hearing for section 1983 issues in some court system, and therefore such scrutiny should be used in all last-federal-stop situations. The contextual differences could be reflected by modifying rather than rejecting the *Hathorn* approach. The burden of digesting state law and practice can be placed on the section 1983 plaintiff, who must rebut an initial presumption that the state will fairly determine the federal claims.[285] A demonstration that these claims will probably not be given a hearing on the merits or effective redress by state tribunals would satisfy this burden.

Such careful methodology is not essential when the federal district court makes no immediate determination, but retains control over the ultimate outcome of the litigation. Justifiable efficiency permits a no-waste approach, protecting the litigant with a minimum of effort. One federal doctrine implementing that approach is *Pullman/England* abstention,[286] which requires state court clarification of a potentially unconstitutional state statute. The benefit of abstention is that the constitutional defect may in some cases be obviated. Nonetheless, a plaintiff can exercise the option of re-entering the federal gates with a constitutional challenge to the newly interpreted law. The possible gain of time for the district court judge imposes costs on the plaintiff,[287] but does not extinguish the claim.

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284. Circuit court reversal or certiorari review of the federal district court's abstention decision would be rare, especially in view of the present *Pennzoil* and *Parratt* approaches. *See supra* subparts II(B) and III(A). *But cf.* Deakins v. Monaghan, 484 U.S. 193 (1988), discussed *supra* subpart II(C) (Court reviewed lower court nonintervention decisions in order to set guidelines for handling damage requests relating to pending prosecutions).

285. This less time-consuming but realistic scrutiny is discussed in detail, *infra* Part V.

286. *See supra* section II(A)(2).

287. *See, e.g.*, A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48-50, 282-87 (1969).

A "wait and see" approach was carefully crafted in *Deakins v. Monaghan*[288] where the section 1983 plaintiffs were defendants in a state prosecution. They sought damages against state officials for an allegedly unconstitutional search. Justice Blackmun, writing for the Court, pointed out that plaintiffs' monetary claims could not be heard in the criminal case, but could be eligible for state consideration in a separate suit.[289] As we have seen, dismissal of the damage claim was not warranted because plaintiffs' state remedy might be unsatisfactory. Nor was immediate disposition of the merits authorized, because a federal pronouncement could have a res judicata impact on the pending prosecution. The district court was directed to retain jurisdiction only to insure that the federal claims received an appropriate state hearing.[290]

2. Lessening Overload.—Prudential doctrines fashioned by the Supreme Court, centering on procedural requirements such as standing, have restricted access to the federal judiciary.[291] Occasionally, one of the Justices has acknowledged that these technical doctrines accompanied by elaborate justifications have been fueled by the purpose of relieving busy judges of their workload.[292]

Until recently, the Supreme Court itself has experienced such a

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288. 484 U.S. 193 (1988), analyzed *supra* subpart II(C). *See infra* Part V (discussing retention of jurisdiction as a methodology preferable to dismissal in cases where state remedies are uncertain).

289. 484 U.S. at 204.

290. *Id.*

291. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 512-14 (1975) (plaintiffs representing a wide variety of allegedly injured parties including minority groups, taxpayers, builders, and tenants, had no standing to challenge town zoning policies).

292. *See, e.g.*, former Chief Justice Burger's dissenting opinion in Moore v. City of East Cleveland, 431 U.S. 494, 522-23 (1977) (Burger, C.J., dissenting); Fiss, *supra* note 4, at 1140; Comment, *Post-*Younger *Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L.J. 523, 566. *Cf.* Fiss, *supra* note 4, at 1160, suggesting that the Supreme Court has used jurisdictional doctrines such as federalism as tools to curb idealistic judges. Commenting on this theme, Professor Redish notes that if such doctrines are simply veiled attempts to curb district court protection of civil rights, "any analysis that takes the Court at its word might be guilty of the grossest naivete." Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 466 n.15 (1978). He adds that there may, however, be value in explaining the court's actual purpose. *Id. See also* Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 53 n.18 (1989) (concluding that the hostility of some Justices to § 1983 has been thinly disguised by undeveloped policy formulations); Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181 (1989) (expressing concern that, in the context of suggested revision of the Federal Rules of Civil Procedure, "otherwise legitimate efficiency-based arguments are being pressed into the service of a political agenda hostile to the *substantive* rights of certain classes of federal litigants." (emphasis in original)).

burgeoning docket[293] that intricate schemes have been proposed to create a new federal court that would handle the excess filings,[294] and more modest proposals have been enacted to reduce the number of cases eligible for review.[295]

It would, therefore, have been expedient for the high Court to approve self-assessments by state tribunals that proffer adequate state grounds and deny inconsistency with prior precedents. This approval would signal to similarly situated litigants that certiorari application would be futile. Particularly egregious cases, where cynically erected "springes" have insulted the Court's intelligence,[296] could still be considered.

The Justices have not adopted such a restrictive posture. One possible reason for their use of the more realistic *Hathorn* standard is that rejecting the adequacy of state grounds results in more work for the state judiciary, but not for the federal district courts. Yet, this standard requires careful scrutiny, permits repeated return of cases to the Supreme Court,[297] and may encourage more certiorari candidates. The *Hathorn* standard is not the most expeditious way of guarding the federal portals, but it is an efficient method of preserving federal rights.

At the district court level, caseload concerns arise from an ex-

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293. The Supreme Court appears to be limiting significantly the number of certiorari candidates it is accepting and, on November 27, 1989, surprised observers by issuing its regular Monday order list without granting a single new case. Greenhouse, *Case of the Shrinking Docket: Justices Spurn New Appeals*, N.Y. Times, Nov. 28, 1989, § A, at 1, col. 1. Although the number of cases offered to the Court had risen slightly over the prior year's figure, the caseload is no longer showing the rapid increase of the late 1970s. *Id.* § B, at 6, col. 5.

294. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & M. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 43-45 (3d ed. 1988) [hereinafter HART & WECHSLER] describing proposals for a new National Court of Appeals with final authority to screen all certiorari petitions and deny any of them, and an Intercircuit Tribunal consisting of two judges from each circuit to hear cases referred to the Tribunal by vote of five Supreme Court justices.

295. *See supra* note 283, describing elimination of the Supreme Court's mandatory appeals jurisdiction.

296. *See supra* note 38 (discussing the Supreme Court's use of this phrase in James v. Kentucky, 466 U.S. 341, 349 (1984)). *See also* Ward v. Board of County Comm'rs, 253 U.S. 17 (1920), where a state's highest court had denied relief to Indians claiming federal immunity from taxation, finding that the tax had been paid voluntarily. The United States Supreme Court held that there was no fair or substantial support for this "plainly untenable" finding. *Id.* at 22-23.

297. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 360 U.S. 240, 245 (1959) (per curiam) (granting certiorari and reversing a state judgment inconsistent with Supreme Court's previous mandate). *See also* the repeated visits of Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), described *supra* notes 21-28.

ponentially growing docket.[298] District courts could increase disposition rates by cutting down the reflection time allotted to section 1983 cases and then dismissing them. Such a time-oriented rationale was not explored in *Pennzoil*, but is well served by the Supreme Court's presumption that no equitable relief should issue against a pending state action unless state law "plainly bars" the section 1983 claim. Overcoming the presumption apparently requires that plaintiff meet a burden somewhat resembling the high civil standard of "clear and convincing" evidence.[299] Ambiguous statutes provide no basis for preventing dismissal under this standard, and even a lower state court interpretation that precludes reception of the federal issues could be deemed insufficient to sustain plaintiff's burden.[300]

In the procedural due process area, *Parratt*'s effort to hold back the "font of tort law"[301] implicates time concerns as well as a more developed federalism rationale. The Supreme Court has failed to provide guidance on what constitutes adequate redress for unauthorized deprivations of liberty and property by state officials. This failure could shorten the district court life of such due process cases in several ways. Some judges have concluded that paper relief[302] or

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298. *See, e.g.*, HART & WECHSLER, *supra* note 294, at 50-52 (summarizing statistics on civil filings). Comparing 1970 and 1986 figures, civil rights actions (particularly those in the employment discrimination and prisoner petition categories) rose substantially.

Congress has recently taken measures to shrink the civil caseload by removing diversity jurisdiction in cases where less than $50,000.00 is at stake. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 201-03, 102 Stat. 4642, 4646 (1988) (amending 28 U.S.C. § 1332). Congressional efforts to reduce diversity jurisdiction further are continuing. Labaton, *Business and the Law, Panel Urges End of Diversity Rule*, N.Y. Times, Jan. 8, 1990, § D, at 2, col. 1. In addition, a recommendation that would virtually abolish diversity has been developed by a group of judges, legislators and legal scholars appointed by Chief Justice Rehnquist to a panel established by Congress. Diversity would be retained only in rare multiparty disputes, such as airline catastrophe cases and in suits involving foreigners. *Id.*, Mar. 23, 1990, § B, at 5, col. 3. Because diversity cases involve no federal questions and can be heard in state tribunals, their elimination from the federal docket is a far more appropriate time-saving device than deportation of federal claims that would probably not be considered in any forum.

299. The plaintiff's burden of proving that state law plainly bars the § 1983 claim should be no higher than preponderance of the evidence, and the burden should shift to the state if there is apparently no mechanism for litigating the federal claims. *See infra* note 379. *See generally* Underwood, *supra* note 111, at 1301 (discussing the implications of the "clear and convincing" standard).

300. *See supra* discussion of *Pennzoil* at notes 89-101 and accompanying text. *See also* notes 110-11 and accompanying text.

301. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (adopting the phrase from Paul v. Davis, 424 U.S. 693, 701 (1976)).

302. *See supra* notes 254-58 and accompanying text (discussion of Rittenhouse v. DeKalb County, 764 F.2d 1451, 1459 (11th Cir. 1985), approving as adequate a "remedy" that consisted of the right to file a state court damage action against automatically immunized defendants).

remedies arbitrarily withheld for years[303] are adequate. Others have created no-win rules for litigants.[304]

Why not characterize these consequences as justifiable efficiency rather than expedience? This characterization would probably require a more forthright articulation of a cost-benefit rationale than the Supreme Court has so far offered. More importantly, it is "the exclusive province of the Congress not only to formulate legislative policies . . . but also to establish their relative priority for the Nation. Once Congress . . . has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought."[305]

The objectives advanced by section 1983 slice through the Anti-Injunction Law,[306] establish the federal courts as buffers between states and citizenry, and generally preclude jurisdictional prerequisites such as exhaustion of state administrative remedies.[307] The Supreme Court Justices have propounded this congressional plan and yet undermined it by introducing their own jurisdictional

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303. *See supra* notes 259-60 and accompanying text.

304. *See supra* notes 264-66 and accompanying text.

305. TVA v. Hill, 437 U.S. 153, 194-95 (1978) (affirming issuance of an injunction against completion of a dam that would threaten the survival of species protected under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976), and holding that contrary action would infringe on the congressional power to establish law).

306. *See supra* notes 51-52 and accompanying text.

307. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496 (1982). Plaintiff's § 1983 suit charged her employer, a state university, with discrimination on the basis of race and sex. The court of appeals' en banc decision did not approve dismissal of the action, but indicated that it would have done so if the state administrative process had been fair, speedy, and had offered interim relief as well as effective redress for the claim where warranted. *Id.* at 499. The Supreme Court reversed, noting that an exhaustion requirement would run counter to the thrust of the 1871 congressional debate on § 1983's predecessor provision. *Id.* at 507, 516. Congress had assigned the federal judiciary a paramount role in preserving constitutional rights, and had empowered plaintiffs to choose a federal rather than a state forum. *Id.* at 503-06.

See also the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (1982), which applies to adult prisoners who file § 1983 actions. Under rigidly specified conditions, federal courts are authorized to delay further action for a maximum of 90 days while such plaintiffs exhaust prison grievance procedures that have been certified under standards established by the Attorney General of the United States. *Id.* § 1997e(2). Very few states' procedures have been certified, and one commentator has concluded that states are not interested in pursuing certification, among other reasons because the 90-day delay provides too little incentive. Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 IOWA L. REV. 935, 949-51 (1986). The *Patsy* opinion cited the elaborate provisions of § 1997e, which were passed in 1980, to demonstrate that Congress continues to assume that exhaustion of administrative remedies requirements are generally inappropriate in § 1983 cases. 457 U.S. at 511.

For a discussion of the differences between coercive and remedial measures, see *supra* note 68.

doctrines.[308]

Laboring to reconcile dismissal of section 1983 actions with the federal judiciary's role as "guardian" of civil rights,[309] the Court substitutes state judges as suitable surrogates. *Younger v. Harris* finds that federal intervention is unnecessary when a single state proceeding "would be adequate to protect the rights asserted."[310] *Hudson v. Palmer* concludes that a state employee's intentional and unauthorized destruction of property does not violate the due process clause "provided, of course, that adequate state post-deprivation remedies are available."[311]

This key fact about state processes cannot be determined unless the district court's predismissal scrutiny is itself adequate. The difficult reconciliation of congressional and judicial wills that marks section 1983 jurisprudence depends upon the legitimacy of the substitute guardianship.

B. Equity

Although section 1983 refers to a "suit in equity" as permissible redress, the Supreme Court's exercise of rulemaking power under the Enabling Act of 1934[312] established the union of law and equity in one form of suit known as a civil action.[313] Just as courts of equity had evolved to fill gaps in the effective reach of law courts,[314] so equitable remedies operate as an Aristotelian "correction of legal justice."[315]

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308. *See generally* Fiss, *supra* note 4; *see also* Monaghan, *supra* note 205, at 982. Professor Redish raises the crucial question of whether the federal judiciary has the authority to set aside the directives of § 1983 and the jurisdictional correlative of 28 U.S.C. § 1343 (1982), and concludes that such judicial action violates separation of powers principles. Where Congress decides to make federal jurisdiction turn on the efficacy of state redress, it does so by an express provision such as the Civil Rights Removal Act, 28 U.S.C. § 1443 (1982). Redish, *supra* note 4, at 111.

309. *See Patsy*, 457 U.S. at 503 (quoting with approval from Mitchum v. Foster, 407 U.S. 225, 252 (1972), discussed *supra* note 59).

310. Younger v. Harris, 401 U.S. 37, 44 (1971).

311. Hudson v. Palmer, 468 U.S. 517, 533 (1984).

312. 28 U.S. § 2072 (1988).

313. *See* FED. R. CIV. P. 2, enacted pursuant to the Enabling Act of 1934, Pub. L. No. 100-702, tit. IV, § 401(1), 102 Stat. 4648. Section 1983's wording emanates from its predecessor, the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

314. F.W. MAITLAND, EQUITY—A COURSE OF LECTURES 1-9 (1936); *see also* C. REMBAR, THE LAW OF THE LAND 272-75, 280-81 (1980); C.D. BOWEN, THE LION AND THE THRONE 359 (1957).

315. *See* ARISTOTLE, BK. V, CH. 10, *11376 NICHOMACHEAN ETHICS 1019-20 (1941).

> When the law speaks universally . . . and a case arises on it which is not covered by the universal statement, then it is right . . . to correct the omission—to say what the legislator himself would have said had he been present, and would

In two of the areas we have considered, equity's remedial significance is somewhat limited. First, Supreme Court review of adequate-state-grounds determinations involves equitable principles only in the jurisprudential rather than the procedural sense. Appellate jurisdiction includes the power "to make such disposition of the case as justice requires."[316] Procedural rules should not be enforced with such severity that they mandate "resort to an arid ritual of meaningless form."[317] Fairness concerns are implemented without being crystallized in specific remedies.

Second, equity has not played a prominent role in the constitutional tort context. Commentators have suggested that such cases could often be appropriately resolved by issuance of an injunction or a declaration requiring the provision of adequate process.[318] However, many plaintiffs have requested money damages,[319] and courts have regarded damages as the usual form of relief for injuries

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have put into his law if he had known. Hence, the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement.

Id.

316. Patterson v. Alabama, 294 U.S. 600, 607 (1935). Defendant in *Patterson* had been convicted of rape and the death sentence had been imposed after a third trial. His contention that black citizens had been systematically excluded from both the grand and petit juries was not considered by the Supreme Court of Alabama because counsel had misunderstood state procedure and filed a motion for a new trial too late. The United States Supreme Court held that this procedural determination was in accord with prior state cases. However, a companion case involving the same proof but no procedural barrier, Norris v. Alabama, 294 U.S. 587, 596 (1935), found that racial discrimination was established. The *Patterson* court therefore held that "in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Id.* at 607. *Patterson* was remanded to give the state court an opportunity to review its prior determination in light of the *Norris* findings. Alabama granted a new trial and sustained the conviction. Patterson v. State, 234 Ala. 342, 175 So. 371, *cert. denied*, 302 U.S. 733 (1937).

317. Staub v. City of Baxley, 355 U.S. 313, 320 (1958). *See also* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297-98 (1964); Wright v. Georgia, 373 U.S. 284, 291 (1963). In all of these decisions, rejection of a state's adequate-state-grounds claim was based in part on inconsistency with prior state precedents.

318. *See, e.g.*, Whitman, *supra* note 228, at 267-68. The state officials responsible for a constitutional tort are not usually in a position to create postdeprivation process, and it may be unfair to hold individual officials liable for an injury resulting from the system as a whole. Where a category of deprivation is high-risk and foreseeable, due process might demand that measures be instituted to minimize that risk. *Id.*

Professor Whitman also concludes that damage actions should only be used where punishment is appropriate. Compensation can be handled administratively, while deterrence and clarification of plaintiffs' rights are best accomplished through equity. Equity can supply specific direction to deter future wrongs. *Id.* at 242, 262.

319. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 530 (1981). *But see, e.g.*, Paul v. Davis, 424 U.S. 693, 712 (1976). Plaintiff unsuccessfully sought damages and equitable redress because his photograph had been included in a police department flyer identifying ac-

akin to torts[320] and discussed state redress from this vantage point.[321]

By contrast, equitable remedies have been a focal point in section 1983 cases requesting intervention in pending state proceedings. Judicial refusal to grant injunctions or declarations in such cases has been directly tied to the adequacy of state remedies "at law" which render equitable assistance unnecessary.

Younger did more than incorporate the prior doctrine that a plaintiff invoking equity must show that he has no legal recourse and is threatened with irreparable injury.[322] The majority also concluded that state and federal remedies are equally relevant to the assessment of plaintiff's alternatives.[323]

This approach purports to follow traditional principles that disfavored injunctions against good faith criminal prosecutions.[324] Yet, as Professor Redish highlights, this restriction was an outgrowth of a unitary English court system which had no state parallel, and would therefore be applicable only to federal proceedings.[325] The drafters of section 1983's statutory precursor probably did not envision that the "suit in equity" they authorized would be ineffective against a state prosecution, particularly in light of their expressed doubts about the state judiciary's willingness to enforce the Constitution.[326]

The irony of invoking equity to prop up *Younger*'s jurisdictional restrictions becomes apparent when these restrictions are coupled with the Supreme Court's treatment of ambiguous state law. The issue of whether an alternate forum is in fact available has been

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tive shoplifters. The Supreme Court denied relief on the grounds that the Constitution does not protect this injury to reputation.

320. *See, e.g.*, Whitman, *supra* note 180, at 41.

321. *See, e.g.*, *Parratt*, 451 U.S. at 543; *Hudson v. Palmer*, 468 U.S. 517, 534-35 (1984).

322. Younger v. Harris, 401 U.S. 37, 43-44, 46 (1971); *see supra* note 57 and accompanying text (discussing other ways in which *Younger* restricted access to the federal gates). "Great and immediate" was added to the irreparable injury requirement. *Younger*, 401 U.S. at 46. Extraordinary circumstances, such as prosecutorial harassment with no prospect of local judicial vindication, must also be shown. *Id.* at 48.

323. *Id.* at 52-54.

324. *See* Bator, *supra* note 4, at 622 n.49.

325. *See* Redish, *supra* note 4, at 85-86.

326. *Id.* The Supreme Court has ruled that § 1983 is an exception to the Anti-Injunction Law, because its purposes would be frustrated if the pendency of a state proceeding automatically precluded federal court action. *See supra* note 59 and accompanying text.

The *Younger* opinion acknowledged that the equitable restraint doctrine emanated from inapposite historical antecedents. It justified its adaptation of this doctrine in part by reference to the advantages of avoiding duplicative proceedings—a concern that implicates efficiency as much as equity. *Younger*, 401 U.S. at 44-45.

reduced to virtual invisibility. *Pennzoil* reaffirmed that the federal judiciary need not concern itself with the state remedy "at law" unless consideration of the section 1983 claim would be "plainly barred."[327]

Genuine equitable concerns, such as preventing the jury's role from being eroded,[328] would not be jeopardized by substituting conscientious scrutiny for *Pennzoil* indifference. For example, the Second Circuit's action in lowering Texaco's bond left the *Pennzoil* jury's function intact. Equitable relief at the state trial stage (assuming all other jurisdictional requirements were met)[329] would generally not remove issues from jury consideration. Rather, the district court would address only those federal claims that apparently would be precluded in the local proceeding. If a federal declaration or injunction would have an unwarranted effect on that proceeding, jurisdiction could be retained without granting relief until after the jury's verdict.[330] And if the state trial were itself unlawful, the jury would have no legitimate function to fulfill.[331]

Equity can be viewed in its jurisprudential role of enhancing fundamental fairness, or in its procedural role of filling gaps in the law. Neither aspect supports the "plainly bars" rubric. If a federal plaintiff proffers a substantial and pressing claim, equity necessarily presumes a thorough examination of the state remedy before a *Younger* dismissal.

C. Avoiding Disruption, Fostering Federalism, and Comity

Comity-related jurisprudence has provided elaborate justifications for restricting federal jurisdiction over the types of section 1983 cases discussed in this Article. The Supreme Court has, in most instances, solicitously protected state autonomy and the harmonious co-existence of dual judicial systems.[332] This protection

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327. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14-18 (1987).

328. *Younger*, 401 U.S. at 44-45.

329. *See supra* note 87 and accompanying text.

330. *See supra* subpart II(C) (discussing the Supreme Court's reasoning in Deakins v. Monaghan).

331. *See, e.g.*, Hamm v. City of Rock Hill, 379 U.S. 306, 310-11 (1964) (holding that the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1988), prohibits prosecution of persons peacefully seeking service in a place of public accommodation). Such persons would not only be immune from conviction, but would have a statutory right not to be brought to trial on trespass charges. Georgia v. Rachel, 384 U.S. 780, 793-94 (1966).

332. *See, e.g.*, *Younger*, 401 U.S. at 44; Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 287 (1970) (because of the importance of maintaining separate judicial systems, federal courts may not stay pending state proceedings unless an exception to the Anti-Injunction Act applies).

could be viewed as benefitting only the states and necessitated by constitutional directives,[333] or as also benefitting the national government regardless of such directives.[334]

1. Comity and Adequate State Grounds.—Federal district court action may be constrained by comity towards a parallel state system. While the high Court tops the judicial pyramid, a special brand of deference filters down to state tribunals. The Supreme Court has interpreted its own jurisdictional boundaries so as to preclude settlement of state issues.[335]

Nonetheless, where a litigant presents a federal claim that a state refuses to consider because of a procedural barrier, the Court examines the procedure to insure that there is an adequate nonfederal basis for the state's judgment. *Hathorn* succinctly set out the central theme: "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."[336]

Such adequate-state-grounds cases vindicate federal rights,[337]

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333. As the Supreme Court noted in *Atlantic Coast Line*: "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government . . . . One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies." 398 U.S. at 285.

334. *See Younger*'s comment that "the National Government will fare best if the states and their institutions are left free to perform their separate functions . . . ." 401 U.S. at 44. Professor Althouse suggests:

> There are distinct advantages to having a parallel system of courts working alongside the federal courts and furthering the interests expressed in federal law. State courts are in a better position to control violations of federal rights presented in their own proceedings, as long as they do not perpetuate violations. Moreover, they may, at least in some states and during some periods of history, surpass the federal courts in protecting individual rights, both by vigorously enforcing federal law and by developing state law alternatives.

Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051, 1086 (1988). *But see* Beermann, *supra* note 292, at 80 (concluding that the Supreme Court's federalism rationale has not been predicated on allocating functions to the entity that can most ably perform them).

335. *See supra* subpart I(A). Some commentators have suggested that such deference is not constitutionally mandated. *See, e.g.*, Matasar & Bruch, *supra* note 17, at 1322-25. Others have concluded that deference is most appropriate when states "overprotect" federal rights—that is, exceed constitutionally required standards applicable to the federal claim. *See* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1493-94 (1987).

336. 457 U.S. 255, 263 (1982).

337. NAACP v. Alabama, 357 U.S. 449 (1958), for example, considered forty years of relevant Alabama opinions and then unanimously held: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457. While here detrimental reliance was emphasized,

and, as a possible corollary, help insure uniformity of federal rights. The latter purpose is less clear, because typically, the prior precedents used in determining the thrust of state law involve only state law claims.[338] At the very least, however, close reading of relevant precedents gives an opportunity for Supreme Court review to any litigants in the state whose federal claims[339] would otherwise be barred by an irregularly applied rule.

The *Hathorn* principle has been maintained despite its potential for disruption of state policy and insult to local officials.[340] On the one hand, inconsistent application of law may indicate that the state has no crucial interest in maintaining the offending procedural barrier. If it does have such an interest, it may establish a well-defined rule for future litigation. On the other hand, the Supreme Court's review and rejection of the proffered state ground compels the state judiciary to hear the litigant's claim on the merits and to ignore the challenged procedural requirement in all comparable cases accruing before announcement of a firm future policy. This new policy may still be set aside if it is deemed to preclude a fair opportunity to present federal questions.[341]

Insult to the state is inherent in the adequacy scrutiny. Reversal of an erroneous state decision on the merits is a normal incident of the appellate process, but the *Hathorn* context involves more than this. There, the Supreme Court's message to the highest state tribunal is in essence: "You should have honored your responsibility under the supremacy clause[342] instead of submerging federal rights. You mischaracterize the basis for your decision and misread the import of your own past opinions on state law questions."

2. Comity and Pending State Proceedings.—The careful adequacy inquiry required by *Hathorn* is the antithesis of the casual disregard affirmed in *Pennzoil* for cases where a section 1983 litigant requests

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other decisions have cited a due process obligation to exercise discretionary power to entertain a federal claim. *See supra* discussion in subpart I(A).

338. *See, e.g.*, Quinn v. Branning, 404 So. 2d 1018 (Miss. 1981) (portion of a criminal statute violated the state constitution's prohibition against local legislation).

339. Close scrutiny may be more appropriate for cases involving federally created rights rather than state generated rights protected by the Constitution (*e.g.*, contracts clause controversies). *See* Sandalow, *supra* note 18, at 222-23.

340. *See supra* notes 21-28, 35-38.

341. *See, e.g.*, Reece v. Georgia, 350 U.S. 85 (1955); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949); Davis v. Wechsler, 263 U.S. 22 (1923); National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U.S. 635 (1904).

342. U.S. CONST. art VI binds state judges to uphold the Constitution and federal law, even in the face of contrary state enactments.

district court intervention in pending state proceedings.[343] One might suppose that the divergence between the two approaches could be explained by a greater potential for disruption and disrespect for state institutions in the *Pennzoil* context. This supposition becomes less plausible on further analysis.

First note what is not in dispute. A pending state action can be interrupted if it provides no mechanism for litigating federal questions raised by a section 1983 plaintiff.[344] The remaining issue, then, is whether the risk of interference would increase significantly if district courts were to review state law conscientiously before dismissing a section 1983 case. The implication that federal judges are expected to avoid that risk by performing their statutory duties with a rubber stamp is disquieting.

More instances of inadequacy might well be found under a heightened scrutiny level. However, the down-side risks to state autonomy arising out of this scrutiny somewhat resemble the risks of disruption present under the *Hathorn* standard. In both contexts, the case at bar is directly affected, but the state has an opportunity to change its procedures for future litigation.[345] If these changed procedures violate federal law, they may still be invalidated.

For example, in *Pennzoil* the Second Circuit approved a lower bond for Texaco, concluding that state law was so ambiguous that the company could be deprived of any hearing on its challenge to the constitutionality of the Texas bond and lien provisions.[346] If the United States Supreme Court had adopted this approach, the impact would have been felt largely by Pennzoil, a private litigant whose security for its judgment would have been substantially weakened. The state's highest court could have exercised its discretionary certiorari powers to insure a hearing on the constitutional question during the course of *Pennzoil*'s progress through the state's judicial system.[347] For future cases, Texas could choose to clarify its statutory or decisional law as to the availability of a vehicle for con-

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343. *See supra* subpart II(B).

344. *See supra* note 109 and accompanying text.

345. The issue in *Hathorn* was Mississippi's refusal to consider a claim under the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965), because it had not been raised until a petition for rehearing was filed in the state's highest tribunal. *See also supra* note 44 and accompanying text (further discussion of *Hathorn*). The effect of the United States Supreme Court's decision was to compel the state to consider the federal claim on the merits. Mississippi retained the power to promulgate a constitutionally sound alteration in the rehearing procedure, which would be binding in new cases.

346. Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986).

347. *See supra* note 92 and accompanying text.

sideration of federal issues that relate to a private lawsuit but are independent of the merits of such a suit.[348]

Avoiding unnecessary disruption or delay of state judicial proceedings is a central *Younger* theme.[349] This purpose is not undermined by the modest requirement that dismissal of a section 1983 claim, without reference to its merits, be predicated on the existence of a genuine state forum. It is the state, through its legislature and judiciary, that determines whether or not it will receive the federal plaintiff.[350]

If not disruption, what of disrespect? Although notions of comity and federalism are often invoked as though they were identical twins, it is instructive to consider them individually. Comity has an aura of courteous recognition—of deference to another sovereign.[351] Federalism, on the other hand, speaks both to national unity and state autonomy.

Younger does not reflect the nationalist suspicion of state institutions that is implicit in other Supreme Court opinions[352] and in section 1983 itself. Nonetheless, the federalism enshrined by the majority does not validate one-way deference. While Justice Black's

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348. The United States Supreme Court considered the amorphous Texas Open Courts provision to provide sufficient assurance that no litigant would be unfairly deprived of judicial access. *See supra* note 100 and accompanying text.

349. *See supra* note 57 and accompanying text.

350. Nor does this forum requirement alter substantive state provisions. Substantive policy would be affected only indirectly, for example in a situation where the federal district judge retained the case because the state's door was closed and at a further stage in the litigation issued relief based on the merits. If state judges enforce federal law with the same regularity as their district court counterparts, as *Younger* suggests, the challenged policy could fare the same in either court. *See, e.g.*, Redish, *supra* note 4, at 91-92.

Protection of state substantive policy against federal interference apparently does not have a high position in the Supreme Court's panoply in any event. Steffel v. Thompson, 415 U.S. 452 (1974), concludes that comity and federalism have "little force" absent a pending state proceeding, even though a declaration of unconstitutionality under such circumstances could have a great impact on substantive law. *Id.* at 462; *see supra* note 72 (further discussion of *Steffel*). Professor Redish points out that equitable relief under *Steffel* could affect prosecutorial and police discretion to the same extent as the issuance of such relief in a pending proceeding. Redish, *supra* note 292, at 475.

351. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 536 (2d ed. unabridged 1961) [hereinafter WEBSTER'S].

352. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225 (1972), discussed *supra* note 59 and accompanying text; Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988). Professor Fallon eloquently argues that the Supreme Court's federalism decisions reveal a tension between two views. The Nationalist model, an outgrowth of post-Civil War constitutional and legislative enactments, emphasized the primacy of federal expertise and federal rights. By contrast, the Federalist model would limit federal judicial action against the states and recognize state competence to enforce constitutional guarantees.

opinion stressed leaving the states free to carry out their own functions, it also recognized a union in which the national government has "legitimate interests."[353] Among those interests is vindication of federal rights.[354] The federalism rationale envisions intersecting spheres. The overlap is hardly excessive when the federal judiciary reviews a claim that the state would probably not adjudicate. Dismissal could compel the section 1983 plaintiff to expend time and money in the state forum without being heard.[355]

Nor is there a slur on a state's ability to determine constitutional questions where that state apparently does not provide a vehicle for such a determination.[356] Indeed, any insult to state judges is far more trivial in the pending proceedings context than under *Hathorn*, where the state court's finished product is minutely examined and then returned for overhaul.

3. Comity and Constitutional Torts.—The *Hathorn* standard is also considerably more stringent than the approach taken in cases such as *Parratt*. In each of the three areas considered in our comparison, the adequacy of the state forum must be evaluated. The *Parratt* context differs from the others to the extent that it is an outgrowth of substantive constitutional doctrine. If state officers cause random and unauthorized deprivation of property or liberty, their conduct can be challenged in federal court. However, the constitutional right that is implicated remains nascent[357] unless the section 1983 plaintiff is deprived of "the process [that] is due."[358]

Nonetheless, this constitutional element seems to parallel the "adequate remedy at law" discussed in nonintervention opinions. Section 1983 governs both. *Parratt*'s successor, *Hudson v. Palmer*, used the terms "adequate," "meaningful," and "suitable" interchangeably to describe the required state remedy.[359]

These decisions stressed comity and the risk of disruption in

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353. *Younger*, 401 U.S. at 44-45. *Cf.* a pre-*Younger* dictionary definition of federalism: "The federal principle of national organization or its support." WEBSTER'S, *supra* note 351, at 928.

354. *Younger*, 401 U.S. at 44-45.

355. *See, e.g.*, *supra* notes 118-28 and accompanying text.

356. Professor Redish concludes that the federal courts that decide § 1983 cases are not themselves the root of offense to state courts in any event. Congress has given § 1983 plaintiffs a choice of forum; thus, it is the federal legislature and federal litigants who are rejecting the state forum. *See* Redish, *supra* note 292, at 482-83.

357. *See supra* notes 165-71 and accompanying text.

358. *Parratt*, 451 U.S. at 357.

359. 468 U.S. 517, 533 (1984); *see supra* notes 184-86 and accompanying text for further discussion of *Hudson*.

developing generally pro-dismissal positions. If every alleged injury inflicted by a state official were cognizable under section 1983, the fourteenth amendment would become a conduit for tort law that would merely replicate state systems.[360] *Parratt* constructed a verbal diagram of the "complex interplay" between common law and statutory provisions in forty-nine states, and a federal law that outranks all states "to the extent of its authority" under the supremacy clause of the Constitution.[361]

Such interdependence required the Court to decide whether Nebraska's tort remedies satisfied procedural due process demands.[362] That goal, however, was circled rather than reached by quotes from prior procedural precedent. No federal action is needed where "[state] *common-law safeguards . . . already exist.*"[363] This reference glided over a general theme rather than providing a methodology for determining the nature and certainty of such safeguards.

The federal judiciary is understandably reluctant to supervise state conduct involving trivial violations such as the negligent loss of a prisoner's hobby kit. Yet lack of instruction from the Supreme Court neither reduces the risk of disruption of state processes, nor distinguishes between constitutional and common-law tort concerns. District courts, given no guidance on what constitutes *Hudson* adequacy, nor on how hard to look for such adequacy, have produced conflicting holdings. These holdings run the gamut from requiring full common law damages where the harm cannot be prevented,[364] to assuming that a remedy "not yet refused" after years of delay is satisfactory.[365]

The inquiry into state processes to determine whether dismissal is warranted should be a modified version of the one developed in *Hathorn*.[366] A federal forum should be accorded where plaintiff demonstrates that the section 1983 issues will probably not be heard in state tribunals or will be considered only after inordinate delay.

Yet comity and federalism should shape the adequacy standard

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360. Parratt v. Taylor, 451 U.S. 527, 544 (1981) (quoting with approval from Paul v. Davis, 424 U.S. 693, 701 (1976)). *See supra* notes 179-81 and accompanying text.

361. *Parratt*, 451 U.S. at 531.

362. *Id.* at 537.

363. *Id.* at 542-43 (quoting from Ingraham v. Wright, 430 U.S. 651, 682 (1977) (emphasis in original)). *See* discussion *supra* note 250.

364. *See supra* notes 267-68 and accompanying text.

365. *See supra* note 259 and accompanying text.

366. *See* examples discussed *infra* in Part V. *See also supra* note 273 and accompanying text (discussing the use of dismissals without prejudice where state law is unclear).

itself to a greater extent in the constitutional tort context than in the other areas we have considered. This is because some *Hudson* cases do not involve an amorphous remedy. Rather, state redress can be obtained, although it is less generous than what is offered under section 1983.[367] If the deprivation of property or liberty alleged in such a federal suit implicates largely the same concerns addressed by the common law, the district court judge need not assume the state's task of adjudicating tort questions.[368] While the mere right to file for an automatically unavailable state remedy would hardly be "meaningful,"[369] a relief gap should not in itself preclude dismissal. Traditional forms of recovery, buttressed by state legislation that governs new substantive areas or procedural questions,[370] can resolve recurring problems.[371]

By contrast, comity cannot be pivotal in a case encompassing federal interests beyond those involved in tort law. In such suits, adequacy should be roughly measured by the remedies Congress has provided for violations of constitutional rights.[372] The use here

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367. *See supra* note 272 and accompanying text.

368. *See supra* notes 244-50 and accompanying text (discussing whether the balancing test developed for pre-deprivation hearings in Mathews v. Eldridge, 424 U.S. 319, 344-45 (1976), is relevant to adequacy inquiries under *Parratt*). Commentators have criticized the *Mathews* approach even in the context of pre-deprivation process, because courts may simply assign heavy weight to whatever interest the state proffers and thereby defeat the § 1983 claim. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 674 (2d ed. 1988).

369. *Hudson*, 468 U.S. at 533; *see supra* notes 188-98 and accompanying text.

370. *See supra* notes 242-43 and accompanying text.

371. *See, e.g.*, Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 581-83 (1985). In wrongful death cases, almost all states have passed legislation authorizing survivors to receive damage awards for loss of support. There is, however, considerable state-to-state variation related to such issues as standing to sue and the availability of punitive damages. *Id.* at 575-78. Professor Steinglass reviews the legislative history of § 1983, and the evidence that the 42nd Congress which passed the predecessor statute, the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, was particularly concerned with wrongful slayings. *Id.* at 645-54. He proposed that § 1983 can itself be a wrongful death remedy independent of state law if its remedial reference to the "party injured" were construed to include survivors. *Id.* at 657-59.

372. The substantial-similarity approach proposed in Part III above does not contravene the dicta, much less the holdings, in *Parratt* and *Hudson*. These opinions formulated the gap question negatively; plaintiff need not receive from the state "all" that the federal statute could accord. Parratt v. Taylor, 451 U.S. 527, 544 (1981); Hudson v. Palmer, 468 U.S. 517, 535 (1984). Such a formulation is consonant with the general axiom that the Constitution guarantees a sufficient rather than an optimal process.

Although congressional rather than state legislation is the applicable guideline for determining sufficiency, the state processes need not be identical to § 1983. The proposed standard is flexible enough to permit distinctions related to the seriousness of the alleged deprivation. For example, the absence of a punitive damages component in state law would not preclude dismissal of a claim involving a state employee's malicious

of section 1983 remedial standards does not displace state provisions, for these provisions were not designed to deal with federal concerns. Section 1983 joins legislation such as the Anti-Injunction Law and the civil rights removal provisions[373] as a manifestation of congressional intent to regulate the federal-state balance of judicial power.

Supreme Court decisions have used efficiency, equity, and federalism rationales to recalibrate this power distribution. These decisions have neglected the subset of justifying adequacy tests that relegate some litigants to nonexistent, delayed, or ineffective state remedies. However, district judges who adopt a heightened scrutiny model can separate such litigants from the larger number whose cases could be appropriately channeled to the state forum.

V. PROPOSED SOLUTIONS AND THEIR IMPLEMENTATION

The following examples illustrate the application of a heightened scrutiny standard to cases like *Pennzoil* and *Parratt*. In each example, the district court decides whether plaintiff's claims would probably[374] be heard in a state forum.

Green, a dentist, is charged with violating the state Dental Practice Act. Her license could be suspended by the State Board of Dentistry for two years if she is found guilty of this charge, and a hearing before the Board is commenced. She brings a section 1983 action in the federal district court, challenging the constitutionality of the Act. While the Board appears to have no authority to consider constitutional issues, state law provides an appeal as of right from any suspension of a dental license. The appeal is heard by a court with plenary power to issue a declaration that has the effect of a final judgment as to the rights of any party to a justiciable controversy. Here, the federal judge could dismiss the complaint under *Younger*[375] and simply include a sentence in the decision describing

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theft of a mental patient's family mementos. Yet deterrence against further harassment of an institutionalized person requires that the federal plaintiff be given full compensation. *See supra* note 241. *See also* G. WHITE, TORT LAW IN AMERICA 62 (1980) (pointing out that deterrence of blameworthy civil conduct has been a historic purpose of tort law).

373. *See supra* note 308 and accompanying text.

374. The word "probable" may be defined as "[h]aving more evidence for than against." WEBSTER'S, *supra* note 351, at 1971. This is the definition adopted in this Article.

375. State regulation of dental practice to assure competence has been characterized as "unmistakably a significant state interest." Allen v. Louisiana State Bd. of Dentistry, 835 F.2d 100, 103 (5th Cir. 1988). *Younger* strictures would therefore be relevant. *See supra* section II(A)(1).

the adequacy of the state remedy.

In a closer case, a family court judge has ordered that Gray, a litigant in a state paternity suit, be committed to a mental hospital for thirty days. Gray commences a section 1983 action alleging a serious constitutional defect in the statute on which the commitment order was based, and seeking an injunction against the commitment. He contends that his challenge to the constitutionality of the order is unlikely to be heard in the state courts because family court judges have no authority to issue declarations striking down statutes, and commitment orders are reviewed only if the appellate courts exercise unusual discretionary powers.[376]

A strict reading of *Pennzoil* would lead the district court to dismiss the complaint on the grounds that state law does not "plainly bar" the federal claims. However, under the standard proposed in this Article, plaintiff would be entitled to a federal forum if he could demonstrate that these claims would probably not be considered by state tribunals. Because the state has a discretionary procedure that might lead to a hearing on the constitutional issue, Gray would have the burden of proving by a preponderance of the evidence that this procedure is too uncertain to be adequate.[377]

An optimal model for determinations of adequacy would be the one developed in *Hathorn*, with the court engaging in a definitive search and intricate analysis of state law. However, in *Hathorn* the state had already refused to act, while in the *Pennzoil* and *Parratt* contexts a prediction must generally be made about whether such a refusal will occur in the future.[378] This Article therefore adopts a modified version of *Hathorn* that places the responsibility of digesting state law and practice on the section 1983 plaintiff.[379]

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376. At least one lower court has concluded that *Younger* does not apply to state civil commitment provisions because such provisions are not related to criminal statutes and therefore implicate no important state interests. *See* Lessard v. Schmidt, 413 F. Supp. 1318, 1319-20 (E.D. Wis. 1976). Decisions such as *Pennzoil*, extending *Younger* far beyond the quasi-criminal realm, have superseded the *Lessard* approach.

377. *See supra* note 299 and accompanying text. Justice O'Connor noted that in the *Parratt* context "the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate." Hudson v. Palmer, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring). The references to "guaranteed" or "available" remedies indicate that an apparent absence of a vehicle for litigating § 1983 claims would require the state to assume the burden of demonstrating adequacy.

Professor Vairo suggests that the proponent of abstention should always have the burden of proof on this point, because presumption should favor plaintiff's choice of forum. *See* Vairo, *supra* note 4, at 206-07.

378. *See supra* discussion in section IV(A)(1).

379. In some instances, a litigant with a meritorious claim may be unrepresented or may have inadequate representation. An optimal standard such as *Hathorn*'s would in-

Gray would marshall the pertinent statute and decisions interpreting it, plus information on whether the higher state courts usually exercise discretionary power to hear expedited appeals from thirty-day commitment orders. The district judge's review of this material and the state's opposing argument could be expeditiously carried out. If Gray's constitutional challenge would probably be heard in the state forum, *Younger* would apply. Conversely, if the state's discretionary rescue process is rarely utilized, the federal court would have a statutory obligation to decide the section 1983 case on the merits.

In some cases, it may be difficult to reach a conclusion about the efficacy of state redress. For example, how should district judges deal with serious allegations of bias in the state trial courts? If the bias does not arise from the nature of the tribunal itself, prejudgment by the federal court would be offensive.[380] Yet, occasionally there seems to be more than a boilerplate accusation involved. The state's appellate courts could repair any erroneous ruling below, but there still might be a long delay before the appeal stage is reached.

A broadly applicable solution, which has the advantage of breathtaking simplicity, is a dismissal without prejudice. Suppose a section 1983 case involving an allegation of state tribunal bias commences in the United States District Court for the Southern District of New York. If *Younger* applies and the state remedy appears to be adequate on its face, the judge notes these facts in a brief order. The case is cleared from the judge's docket, and the section 1983 plaintiff returns only in the event that state appellate review is inordinately delayed. If the case is refiled, it is referred to the same judge who entered the dismissal order.[381] To insure the possibility of return, dismissal should be conditioned upon the section 1983 defendant's waiver of statute-of-limitations objections. This is a device used in forum non conveniens cases[382] and could be equally

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sure that the court would research state law to compensate for this deficit. *See, e.g.*, F.M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 145-146 (1980) (describing efforts to go beyond a party's brief so that all applicable cases and provisions are taken into account).

380. *Compare* Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (state Board of Optometry incompetent to adjudicate issues because of bias resulting from composition of its membership), *with* Kugler v. Helfant, 421 U.S. 117, 127 (1975) (presumption that state judges will be biased in future litigation is improper). *See also supra* notes 261-62.

381. Letter from Clifford P. Kirsch, District Court Executive, United States District Court for the Southern District of New York, to Professor Maria L. Marcus (Dec. 12, 1989) (regarding dismissals without prejudice) (copy on file at *Maryland Law Review*).

382. *See, e.g.*, Vargas v. A.H. Bull S.S. Co., 44 N.J. Super. 536, 552, 131 A.2d 39, 48

serviceable here.

Moving to an example in the *Parratt* area, consider a variation on the *Davidson* facts. A prison guard receives a credible warning that a prisoner will be assaulted by another inmate. The warning is ignored and the attack occurs outside the guard's presence. The severely wounded prisoner brings a section 1983 suit against the guard, who had violated prison procedures by his inaction. State tort law includes immunity provisions that might apply to this type of case but (unlike the governing New Jersey law in *Davidson*) these provisions are unclear.

Here the district court could abstain under *Railroad Commission of Texas v. Pullman Co.*,[383] to permit the state to clarify its law. However, the court's order would preclude plaintiff's return if immunity were inapplicable and the state's tort law provided relief substantially similar to the redress available under section 1983.[384] Note also that any immunity available under federal law should be acceptable under state law.[385]

Another method of insuring implementation of the Civil Rights Act's forum guarantees would be passage of further legislation.[386] An amendment to section 1983 could provide that: "Enjoining a state court proceeding is prohibited only where it is probable that

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(1957); Wendel v. Hoffman, 259 A.D. 732, 18 N.Y.S.2d 96 (2d Dept. 1940). A few courts have utilized dismissals without prejudice in the *Parratt* area. *See supra* note 273 and accompanying text.

383. 312 U.S. 496 (1941). *See supra* note 74 and accompanying text.

384. *See supra* subpart III(B) (discussion of the substantial-similarity requirement proposed in this Article).

Plaintiff would inform the state courts of his federal claims, but reserve the right to return to federal court with these claims if state immunity provisions automatically block recovery. *See supra* note 76 and accompanying text (discussing the res judicata dangers that arise in *Pullman/England* cases where state courts dispose of the federal claims).

No statute of limitations problems would arise from the district court abstention, which would have the effect of a stay. *See* Crane v. Fauver, 762 F.2d 325, 329 (3d Cir. 1985); Board of Educ. v. Bosworth, 713 F.2d 1316, 1322 (7th Cir. 1983).

385. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982), indicating that state executive officers have qualified immunity against damage suits unless they should reasonably have known that they were acting in violation of clearly established constitutional rights. Such immunity would probably not help the defendant in our hypothetical who intentionally permitted the inmate under his supervision to be attacked, because prison personnel should be aware that they have a constitutional responsibility to provide some level of care to inmates. *See supra* notes 220-21 and accompanying text. Depending on the degree of risk known to the defendant, the intentional conduct here could infringe due process. *See supra* note 238 for further discussion of defining duties of care in prison situations.

386. Satisfaction with the Supreme Court's *Parratt* and *Pennzoil* approaches cannot be inferred from congressional silence. *Cf.* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2371 n.1 (1989).

such a proceeding offers a fair opportunity for presentation and resolution of the injured party's claims under this section." It could be further provided that

> This section requires both an opportunity to be heard and a meaningful remedy where any person has been confined in a state institution by compulsion and intentionally deprived of liberty or property interests by a state official while so confined. A state remedy in such cases is meaningful when it bears a substantial similarity to the redress available under this section.

Such a statute, covering both *Pennzoil* and *Parratt* adequacy assessments, would make the underlying presumptions in section 1983 more explicit. Nonetheless, a judicial solution is preferable. Casual and inconsistent treatment of adequacy is a product of the judiciary, not the legislature, and therefore the courts should provide the clarification. Congress is unlikely to act in this area, and can justifiably presume that section 1983's mandate is plain.

There will be many cases like Green's, where a very brief examination of state remedies will be sufficient to establish adequacy. In such cases, a "plainly bars" standard or no standard at all would yield the same result—dismissal. Yet there will be instances where redress is improbable, and summary dismissal without careful inquiry would ultimately leave the litigant with no forum for a meritorious claim. The risk of such a deviation from congressional directives can be reduced by combining examination of state procedures under a modified *Hathorn* approach with increased use of alternatives to outright rejection.

CONCLUSION

The Supreme Court has stated that district judges may not funnel section 1983 cases into state tribunals unless the state offers an "adequate" remedy. Yet the tests governing adequacy determinations focus primarily on the state's prerogatives rather than on its procedures. As a result of this focus, some federal claims deported to a state court are held in limbo until irreparable damage occurs or are not heard at all, while others are accorded only paper or nominal redress. The adequacy requirement is not a mere outgrowth of judicial largess. Rather, it is a substitute for compliance with congressional enactments that give civil rights plaintiffs a choice of forum. These enactments cannot be automatically outclassed by invocation of comity.

An appropriate standard need not make the federal judiciary's

task unmanageable, nor leave the section 1983 litigant without effective redress, nor undervalue remedies made available by the states. This Article proposes that the wide-ranging exploration of opinions and orders by higher state tribunals that the Supreme Court has undertaken in adequate-state-grounds cases be modified for use in *Pennzoil* and *Parratt* situations. Where state law is ambiguous, heightened district court scrutiny is necessary. However, the section 1983 claimant must digest state law and practice, and persuade the court that federal issues would probably not be considered in the state forum. States with precise and receptive provisions will be recognized.

A somewhat different constellation of factors appears in constitutional tort cases where a plaintiff seeks damages for a random and unauthorized injury caused by state officials. Here, the federal judge must not only decide whether state tribunals would consider plaintiff's procedural due process claims, but also whether meaningful compensation is available under state law. In many instances no special federal interest distinct from common law concerns is present, and the state has developed or accreted tort provisions in light of local needs. Under these circumstances, common law remedies would generally be appropriate if they can provide more than nominal recompense.

However, the Supreme Court has identified a distinct constitutional concern where the litigant has been confined in a state institution and intentionally deprived of liberty or property interests by state employees while so confined. In such instances, the "process that is due"—the equivalent of adequacy—should require a state damage remedy that bears a substantial similarity to the redress available under section 1983. Dismissal of the federal suit could be predicated only on surrogate state provisions resembling the congressional measure.

Additional state and private interests must be balanced in hybrid situations where neither federal adjudication on the merits nor unconditional dismissal would be appropriate. Posit a plaintiff who requests damages and an injunction against enforcement of an allegedly unconstitutional state penal statute that would precipitate immediate economic losses. The constitutional issues would be litigated in the course of the state prosecution; however, the financial losses might not be compensated even if the statute were ultimately struck down. Under these circumstances, the federal district court should follow the methodology used in *Deakins v. Monaghan*. Jurisdiction should be retained, to be exercised if interim relief needed

to stave off irreparable injury is unavailable in the state proceeding or if damages cannot ultimately be accorded in the state forum.

The question of which judicial system is more competent, or more likely to uphold constitutional rights, is only tangentially relevant to the thesis that the section 1983 litigant must be assured of appropriate redress in some forum. A tangential connection exists because the federal district court judge should not dismiss the litigant's suit on the mere assumption that state courts will provide such redress. Dismissal after realistic inquiry takes a holistic view of the dual judicial systems: they are independent, yet they interact constructively to insure fair and orderly dispute resolution.